

EU LAWLESSNESS LAW

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Abstract

The European Union (EU) deploys a number of legal techniques in an effort to make sure that virtually no denial of racialized non-citizens' rights—across the spectrum from equality and dignity to the right to life—is ever presented as a violation of EU law, even as the death-toll climbs to the dozens of thousands, turning the Mediterranean Sea into a mass grave through the EU's and Member States' incessant efforts. Making this possible is the work of what we would term “EU lawlessness law”: a careful summoning of diverse legal techniques to make basic accountability and the protection of the rights of the racialized passport poor impossible by creating a shield of impunity against the application of international, national, EU and ECHR rights, values, and principles in a principled breach of the spirit—but not the letter—of EU law. We explain how EU lawlessness law operates, how the EU pays for it, how it passes legal scrutiny, and what its objectives are. We outline why it is a grave violation of EU values and why deploying legality to ensure that the most significant rights are turned into fiction is an affront to the Rule of Law. In the EU, there is usually

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no need to break the law to deny a foreigner her crucial rights: apartheid européen is an essential feature of EU law, from the internal market to the Belarusian forest and the Mediterranean, where the EU's proxies—such as the so-called Libyan Coast Guard—are hunting, torturing and imprisoning by now more than 120,000 racialized innocents. This contribution elaborates on this starting point showing the evolution over the last decades from passive rightlessness to active criminality, committed with full impunity under the aegis of EU law. The rightlessness of the “other” is achieved through the near complete exclusion of non-EU citizens from the fundamental freedoms in the EU dating back to the colonial inception of the Union. Lawlessness sensu stricto is the next step. It stems from the proactive stance of the Union and its Member States towards ensuring that the right to seek protection in the EU is turned into an unworkable proclamation where any means are acceptable to guarantee that the law on the books does not apply to the racialized passport poor at the EU's borders, resulting in unspeakable suffering and a huge death toll. Systemic lack of accountability—legal, as well as democratic—ensures that the EU lawlessness law always favors the Union, never the victims. This paper aims to start bridging the gap between two extremes. On the one hand, there is the day-to-day reality of the outright exclusion of non-citizens from dignity and the protection of the law, backed by the billions the EU has invested alongside countless other incessant efforts to promote lawlessness and a lack of any accountability in targeting the racialized passport poor at EU's borders and further afield. On the other hand, there are the numerous proclamations about the Union's equitable value-laden nature.

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"We were in the water for 13 hours. They [my wife Shifaa, 30, and our two children—a 9-months-old Asem and a 5-year-old Abdulwahab] were alive with me right up to the last hour. After that I could do no more. Can you imagine that they died while I was holding them? I don't understand why I didn't die with them."¹

"They were ... kicking me in the legs, with electric things, long sticks ... I felt so much pain and I felt nothing at the same time. They hit me all over my body, I was screaming and shouting. They said if you don't want to go back, we will hit you so much that we will force you to."²

"There was blood of the [dead and injured] people on the walls and the floor ... [but] it was as if nothing ever happened. They beat you and leave, and no one asks. Death in Libya, it's normal: no one will look for you, and no one will find you."³

¹ Mohamed's testimony is available on TV2: <https://www.tv2.no/nyheter/dei-kasta-oss-i-doden/15154260/>.

² Amnesty Int'l, *Latvia: Return Home or Never Leave the Woods, Refugees and Migrants Arbitrarily Detained, Beaten and Coerced Into "Voluntary" Returns*, 18, AI Index EUR 52/5913/2022 (Oct. 12, 2022), <https://www.amnesty.org/en/documents/eur52/5913/2022/en/>.

³ "Jamal," a 21-year-old refugee present during the deadly shooting in February 2021 in the Abu Salim DCIM (Directorate for Combatting Illegal Migration) center in Libya. His testimony was collective by Amnesty International: Amnesty Int'l, *Libya: 'No One Will Look for You': Forcibly Returned from Sea to*

I. EU'S PASSPORT APARTHEID: THE FLUID "OTHER" BETWEEN EU RIGHTS AND EU LAWLESSNESS LAW

Since 2015, more than 28,000 innocent people have died or "gone missing" in the Mediterranean.⁴ They drowned by themselves thanks to villainous smugglers, the Council submits;⁵ accountability for the death toll is a complex matter, the Court of Justice finds;⁶ besides, the geopolitical times are complex, the Commission might be right in warning us.⁷ But what an accident: *mare nostrum*, a great thoroughfare, suddenly turned itself into a racialized grave.⁸ The EU-Belarus border is another locus of torture and violence,⁹ just as other EU borders.¹⁰ These deaths, like the mass abuse and kidnappings by EU-funded and equipped so-called "Coast Guard" in Libya do not happen by chance,¹¹ allowing Omer Shatz to speak of "EU Crimes

Abusive Detention in Libya 7 (Jul. 15, 2021), <https://www.amnesty.org/en/documents/mde19/4439/2021/en/>.

⁴ For 2023 alone, 4,110 lives were lost. See OPERATIONAL DATA PORTAL, For more data, see MISSING MIGRANTS PROJECT, <https://missingmigrants.iom.int/https://data.unhcr.org/en/situations/mediterranean>.

⁵ European Council & Council of the European Union, *Fighting migrant smuggling and Human Trafficking* (undated) <https://www.consilium.europa.eu/en/policies/eu-migration-policy/migrant-smuggling-human-trafficking/>.

⁶ *WS v. European Border and Coast Guard Agency (Frontex)*, Case T-600/21 EU:T:2023:492 (6 Sept. 2023).

⁷ European Commission, *Proposal for a Regulation of the European Parliament and of the Council Addressing Situations of Instrumentalisation in the Field of Migration and Asylum*, COM(2021) 890 final (14 Dec. 2021) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A890%3AFIN&qid=1639757068345>.

⁸ On the racism of borders, see, Tendayi Achiume, *Racial Borders*, 110 GEO. L.J. 445 (2022); Tendayi Achiume, *Digital Racial Borders*, 115 AM. J. OF INT'L L. UNBOUND 333 (2021); Sheraly Munshi, *Race, Geography, and Mobility*, 30 GEO. IMMIGR. L.J. 245 (2016).

⁹ See, e.g., Sarah Ganty et al., *EU Lawlessness Law at the EU-Belarusian Border*, 16 HAGUE J. RULE OF L.; Amnesty Int'l, *Latvia: Return Home or Never Leave the Woods, Refugees and Migrants Arbitrarily Detained, Beaten and Coerced Into "Voluntary" Returns*, 18, AI Index EUR 52/5913/2022 (Oct. 12, 2022), <https://www.amnesty.org/en/documents/eur52/5913/2022/en/>; Amnesty Int'l, *Lithuania: Forced out or Locked up. Refugees and Migrants Abused and Abandoned*, AI Index EUR 53/5735/2022 (Jun. 27 2022), <https://www.amnesty.org/en/documents/eur53/5735/2022/en>. Grażyna Baranowska, *Pushbacks in Poland: Grounding the Practice in Domestic Law in 2021*, 41 POLISH Y.B. OF INT'L L. 193 (2021). Cf. Maciej Grześkowiak, *The "Guardian of the Treaties" is No More?* 42 REFUG. SURV. Q. 81–102 (2023).

¹⁰ See, already 14 years ago, Human Rights Watch, *Stuck in a Revolving Door: Iraqis and Other Asylum Seekers and Migrants at the Greece/Turkey Entrance to the European Union* (Nov. 26, 2008), <https://www.hrw.org/report/2008/11/26/stuck-revolving-door/iraqis-and-other-asylum-seekers-and-migrants-greece/turkey>. See, more recently, Human Rights Watch, *Greece: Investigate Pushbacks, Collective Expulsions* (Jul. 16, 2020), <https://www.hrw.org/news/2020/07/16/greece-investigate-pushbacks-collective-expulsions>; Amnesty Int'l, *Greece: Violence, Lies, and Pushbacks—Refugee and Migrants Still Denied Safety and Asylum at Europe's Borders*, AI Index EUR 25/4307/2021 (Jun. 23, 2021), <https://www.amnesty.org/en/documents/eur25/4307/2021/en/>; Human Rights Watch, *FRONTX Failing to Protect People at EU Borders* (Jun. 23, 2021), <https://www.hrw.org/news/2021/06/23/FRONTX-failing-protect-people-eu-borders>.

¹¹ See *OLAF Final Report*, CASE No OC/2021/0451/A1, Olaf.03(2021)21088, FRAGDENSTAAT, <https://fragdenstaat.de/dokumente/233972-olaf-final-report-on-frontex/>. For a summary of the report, see Luisa Izuzquiza et al., *Revealed: The OLAF Report on Frontex*, FRAGDENSTAAT, (Oct. 13, 2022), <https://fragdenstaat.de/en/blog/2022/10/13/frontex-olaf-report-leaked/>. See also: Ian Urbina, *The Secretive Prisons that Keep Migrants out of Europe*, NEW YORKER (Nov. 28, 2021), <https://www.newyorker.com/magazine/2021/12/06/the-secretive-libyan-prisons-that-keep-migrants-out-of-europe>); Sarah Ganty & Dimitry Kochenov, *How the EU Death Machine Works*. VERFBLOG (Feb. 27 2024) <https://verfassungsblog.de/how-the-eu-death-machine-works/>.

against Humanity,”¹² which are perpetrated in a carefully-designed legal environment aiming to achieve full impunity.

A. The EU as a major actor of injustice

Gráinne de Búrca’s fear has materialized: the EU graduated into a major actor of injustice.¹³ “Eurowhiteness,” corresponding to an ethno-cultural version of European identity, is probably the best available diagnosis for the ailing of Europe’s self-appointed cosmopolitanism.¹⁴ Luigi Ferrajoli is absolutely right that “only racism makes it tolerable that thousands of people drown every year in the Mediterranean.”¹⁵ The broader context of such violence is well-known to the literature and well captured by Tendayi Achiume: the “first world” and its boundaries are deeply racialized—those drowning in the Mediterranean come from the former colonies,¹⁶ not from the US and Japan. Those tortured in the Białowieża forest are not “Westerners” either.¹⁷ The racism of the EU’s border violence and migration management more generally, has been rightly emphasized in the literature.¹⁸

We submit that all this is a result of the successful implementation of well-designed lawless policies by the Union in collusion with the Member States. These policies are made possible by what we call “EU lawlessness law,” defined as an array of legal techniques deployed by the EU to make sure that mass deprivation of the racialized passport poor of rights is never presented as a violation of the law. EU lawlessness law implies the deployment of legality to void accountability, responsibility and rights of any content, thereby stripping EU Rule of Law of any substance without, seemingly, any formal breach of the law. Lawlessness law thus emerges as a successful way to apply *different* EU law to “Westerners” at the borders than that which is applied to the racialized passport poor from the global south, for whom EU rights, values, and due process of law are made unavailable even in the most embryonic form. EU lawlessness law is thus the crucial tool of Eurowhiteness, which is very well organized to match the minimal standards of rudimentary, often

¹² OMER SHATZ, EU CRIMES AGAINST HUMANITY (JSD Dissertation, Yale Law School, 2023); Omer Shatz & Juan Branco, *Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to Article 15 of the Rome Statute on EU Migration Policies in the Central Mediterranean and Libya (2014–2019)* (2019) <https://www.statewatch.org/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf>.

¹³ Gráinne de Búrca, *Conclusion*, in *EUROPE’S JUSTICE DEFICIT?* (DIMITRY KOCHENOV ET AL., eds, 2015).

¹⁴ HANS KUNDNANI, EUROWHITENESS (Hurst, 2023).

¹⁵ Luigi Ferrajoli, *The New Populism Is Responsible for the Massacres in the Mediterranean*, VERFBLOG (Mar. 13, 2023) <https://verfassungsblog.de/the-new-populism-is-responsible-for-the-massacres-in-the-mediterranean/>.

¹⁶ OLAF Final Report, *supra* note 11.

¹⁷ See Amnesty Int’l, *Latvia*, *supra* note 9; Amnesty Int’l, *Lithuania*, *supra* note 9.

¹⁸ See references in *supra* note 8; See also Steffen Mau et al., *The Global Mobility Divide: How Visa Policies Have Evolved Over Time*, 41 J. OF ETHNIC & MIGR. STUD. 1192 (2015); Umut Erel et al. *Understanding the Contemporary Race-Migration Nexus*, 39 ETHNIC & RACIAL STUD. 1339 (2016); Thomas Spijkerboer, *The Global Mobility Infrastructure*, 20 EUR. J. OF MIGRATION AND L. 452 (2018); Karin de Vries & Thomas Spijkerboer, *Race and the Regulation of International Migration*, 39 NETHERLANDS Q. OF HUM. RTS. 291 (2021). See also MARIE-BÉNÉDICTE DEMBOUR, *WHEN HUMANS BECOME MIGRANTS* (2015); Sarah Ganty, *Silence is Not (Always) Golden*, 23 EUR. J. MIGR. & L. 176 (2021).

“soft” legality, which the EU made available to the brown people of its former colonies and extrapolated to the rest of the passport poor from the global south.¹⁹

Torture, pushbacks and killing of thousands of people from the global south either directly or via proxies can be carried out in an atmosphere of near-total lack of accountability and seemingly beyond the reach of the law.²⁰ While acting in concert with its Member States, the EU is taking on a new function: it is now an accountability shield for mass crimes, generating a fog of faux complexity for all the perpetrators to hide behind: “it wasn’t us!” they cry. Shielding the designers and operators of the EU’s death machine against any accountability emerges as an expression of the new European solidarity, bridging “liberalism” and “illiberalism.”²¹ The evil law underpinning this works through appeals to legality, while overseeing mass deprivations of rights and undermining the Rule of Law.²²

B. EU law’s spectrum of exclusion

Whether inside or outside the EU, EU lawlessness law implies a pro-active legal construction of bespoke lawlessness and arbitrariness, making sure that any rights owed to the “other”—including dignity and not infrequently life itself—are rendered entirely ephemeral and unusable in practice. The complex legal framework that we scrutinize aims at the exclusion of the non-citizens through the execution of a conscious policy and is part of the system of global passport apartheid.²³ Passport apartheid, a global caste system of legally mandated blood-based inequalities can be defined as “the central feature of the world’s population management, mobilizing law, politics and international relations at the service of the blood-based aristocracy

¹⁹ On the passport poor and the victims of citizenship, see, Dimitry Kochenov, *Victims of Citizenship, in CITIZENSHIP AND RESIDENCE SALES 70* (DIMITRY KOCHENOV & KRISTIN SURAK, eds, 2023).

²⁰ See, *inter alia*, Urbina, *supra* note 11; Médecins sans Frontières, *Italy-Libya agreement: Five years of EU-sponsored abuse in Libya and Central Mediterranean* (Feb. 2, 2022), <https://www.msf.org/italy-libya-agreement-five-years-eu-sponsored-abuse-libya-and-central-mediterranean>; Nick Waters et al., *FRONTX at Fault: European Border Force Complicit in ‘Illegal’ Pushbacks*, Bellingcat (Oct. 23, 2020), [²¹ Elena Basheska & Dimitry Kochenov, *Immigration and Citizenship in Europe – Does ‘Illiberalism’ Matter?* \(Feb. 8, 2024\). COMPAS Working Papers No. 167, 2024 \(Oxford\).](https://www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-complicit-in-illegal-pushbacks/#:~:text=Vessels%20from%20the%20European%20Border,and%20TV%20Asahi%20has%20found;Thomas%20Spijkerboer,Bifurcation%20of%20People,Bifurcation%20of%20Law:Externalization%20of%20Migration%20Policy%20Before%20the%20EU%20Court%20of%20Justice,31(2)%20J.%20OF%20REFUGEE%20STUD.232(2017);CONCORD,PARTNERSHIP%20OR%20CONDITIONALITY?MONITORING%20THE%20MIGRATION%20COMPACTS%20AND%20EU%20TRUST%20FUND%20FOR%20AFRICA(2018),https://concordeurope.org/wpcontent/uploads/2018/01/CONCORD_EUTrustFundReport_2018_online.pdf;Cathryn%20Costello%20&%20Itamar%20Mann,Border%20Justice,21%20GERMAN%20L.J.311(2020).See%20also%20Rep.%20of%20the%20Special%20Rapporteur%20on%20Torture%20and%20Other%20Cruel,%20Inhuman%20or%20Degrading%20Treatment%20or%20Punishment,U.N.%20Doc.%20A/HRC/37/50(Feb.%2026,%202018);Rep.%20of%20the%20Special%20Rapporteur%20of%20the%20Human%20Rights%20Council%20on%20Extrajudicial,%20Summary%20or%20Arbitrary%20Executions,U.N.%20Doc.%20A/72/335(Aug.%2015,%202017).See%20United%20Nations%20Support%20Mission%20in%20Libya%20(UNSMIL)%20&%20Office%20of%20the%20High%20Commissioner%20for%20Human%20Rights%20(OHCHR),Desperate%20and%20Dangerous:Report%20on%20the%20Human%20Rights%20Situation%20of%20Migrants%20and%20Refugees%20in%20Libya,58-59(Dec.20,2018),https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf;Jorrit%20Rijpma%20&%20Mathias%20Vermeulen,EUROSUR:Saving%20Lives%20or%20Building%20Borders?,24%20EUR.%20SEC.454(2015).</p>
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²² Anna Lukina, *The Paradox of Evil Law*, in RESEARCH HANDBOOK ON THE POLITICS OF CONSTITUTIONAL LAW (MARK TUSHNET & DIMITRY KOCHENOV eds., 2023); Jack Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65(4) FORDHAM L. REV. 1703–1738 (1997).

²³ Dimitry Kochenov, *Ending the passport apartheid. The Alternative to Citizenship is No Citizenship—a Reply*, 18 INT’L J. OF CONST. L. 1525–30 (2020).

principle underpinning the distribution of resources and opportunities in the world today.”²⁴ EU’s passport apartheid takes different forms, which could be presented as a spectrum.

This spectrum ranges, at one of its extremities—the least extreme in terms of destructive effects—from the appeals to the original constitutional design²⁵ and scope of Union law²⁶ as a core element of the federalist bargain at the heart of the EU,²⁷ in order to make the core elements of the EU legal system unavailable to non-citizens:²⁸ the law’s total absence. This mildest—and the most constitutionally far-reaching—form of passport apartheid, is what could be described as the imperative of rightlessness of the other. It is nothing less than the EU’s disappearing act: like a rabbit into the top-hat of a street clown, the EU disappears entirely *as such* when a non-EU citizen enters the scene. The EU is the only “citizens-only” constitutional system in the contemporary self-identified liberal-democratic world. “Thou shalt not oppress the stranger”²⁹ emerges as the opposite of the EU’s core values.

The story is not new in of itself, but the intensity of this Balibar’s “*apartheid européen*”³⁰ has grown significantly since J.H.H. Weiler bemoaned the sowing of its first seeds in the EU.³¹ The racist colonial history underpinning the current state of affairs is well known. Drawing conclusions from the drafting history of the original Treaties, Hanna Eklund explains, rightly, that the entire personhood regime of EU law is focused on ensuring that the beneficiaries are “ethnically and racially European.”³² This pushed the founding Member States to promote similar discrimination in the context of the accession negotiations with the UK³³ and, ultimately, resulted in the growing “supranational nationalism” in Europe, if we trust Hans Kundnani’s judgement.³⁴

Such ethno-nationalism promoted and reinforced by supranational institutions could provide a possible explanation for the apparently racist nature of EU’s migration governance—here we move to the other end of the spectrum, where violence against

²⁴ Dimitry Kochenov, *Citizenship Apartheid*, in *Elgar Concise Encyclopaedia of Citizenship* (DORA KOSTAKOPOULOU ET AL. (eds) 2025 (forthcoming)).

²⁵ PEO HANSEN & STEFAN JONSSON, *EURAFRICA* (2014); WILLEM MAAS, *CREATING EUROPEAN CITIZENS* (2007); Dimitry Kochenov, *EU Citizenship in the Overseas*, in *EU LAW OF THE OVERSEAS* (DIMITRY KOCHENOV ed., 2011).

²⁶ Pedro Caro de Sousa, *Quest for the Holy Grail—Is a Unified Approach to the Market Freedoms and European Citizenship Justified?*, 20 EUR. L.J. 499 (2014); Alina Tryfonidou, *Reverse Discrimination in Purely Internal Situations*, 35 LEG. ISS. ECON. INTEGRATION 43 (2008); Dimitry Kochenov & Sir Richard Plender, *EU Citizenship: From an Incipient Form to an Incipient Substance?*, 37 EUR. L.REV. 369 (2012).

²⁷ Niamh Nic Shuibhne, *Recasting EU Citizenship as Federal Citizenship*, in *EU CITIZENSHIP AND FEDERALISM* (DIMITRY KOCHENOV ed., 2017); Eleanor Spaventa, *Earned Citizenship: Understanding Union Citizenship through Its Scope*, in *EU CITIZENSHIP AND FEDERALISM* (DIMITRY KOCHENOV ed., 2018); Dimitry Kochenov, *On Tiles and Pillars*, in *EU CITIZENSHIP AND FEDERALISM* (DIMITRY KOCHENOV ed., 2018).

²⁸ Kochenov & van den Brink, *infra* note 75.

²⁹ *Exodus* 23:9.

³⁰ ÉTIENNE BALIBAR, *NOUS, CITOYENS D’EUROPE ?* 192 (2001).

³¹ See Joseph H.H. Weiler, *Thou Shalt Not Oppress a Stranger*, 3 EUR. J. OF INT’L L. 651 (1992).

³² Hanna Eklund, *Peoples, Inhabitants and Workers*, 34 EUR. J. INT’L L. 831, 843 (2023).

³³ D.F. Edens & S. Patijn, *The Scope of the EEC System of Free Movement of Workers*, 9 COMMON MKT. L.REV. 322, 326 (1972); Dimitry Kochenov, *Ius Tractum of Many Faces* 15 COLUM. J. EUR. L. 169 (2009), at 186–190.

³⁴ KUNDNANI, *supra* note 14.

the racialized passport poor is as absolute as it is enabled by EU lawlessness law. At hand is EU's policy of deterring the arrivals of the racialized passport poor at any cost: pullbacks, imprisonment for no crime, torture at the hands of EU-trained and funded proxies outside of the geographical scope of ECHR law in occult spaces where human rights are rendered a strange myth. EU lawlessness law focuses on the creation of an absolute black hole of accountability, allowing national political forces to play the "it wasn't us" game. The EU thus focuses on offering migrants from the global south absolute legal marginalization—which at times results in the physical annihilation of racialized non-citizens in the liminal border spaces,³⁵ ruining hundreds of thousands of lives.

The literature on the criminal nature of this transformation is growing.³⁶ All the rights in the books are denied on the basis of citizenship and race,³⁷ EU lawlessness law successfully replicating the Agambenian *Homo Sacer*.³⁸ EU lawlessness is the law for the racialized "other" attempting to reach European soil from the former "non-civilized" or colonized spaces.³⁹ It is an alternative system of parallel legal regulation reserved exclusively for the non-white people from the global south and is said to pass all the legality tests. This system runs on passport apartheid.

C. EU's passport apartheid

The EU is a clear example of a passport apartheid in action,⁴⁰ where citizenships⁴¹—i.e. blood-based statuses of attachment to public authority distributed by birth lottery⁴²—are taken particularly seriously. The observation that citizenships predetermine the course of our lives to a great degree and vary widely around the world in terms of the rights and liabilities they contain is not a new one: the literature is growing on the rigid caste system which distinguishes a global aristocracy possessed

³⁵ On the concept of 'liminality,' see Audrey Macklin, *Liminal Rights: Sovereignty, Constitutions, and Borders*, in THE RESEARCH HANDBOOK ON THE POLITICS OF CONSTITUTIONAL (MARK TUSHNET & DIMITRY KOCHENOV eds., 2023).

³⁶ SHATZ, *supra* note 12. See generally Ioannis Kalpouzos, *International Criminal Law and the Violence against Migrants*, 21 GERMAN L. J. (2020); Itamar Mann, *Border Crimes as Crimes against Humanity*, in OXFORD HANDBOOK FOR INTERNATIONAL REFUGEE LAW (CATHRYN COSTELLO ET AL. eds., 2021); Itamar Mann, *The New Impunity: Border Violence as Crime*, 42 U. PA. J. INT'L L. (2020). See also Shatz & Branco, *supra* note 12.

³⁷ The reports on 'Westerners' being pushed back at sea or imprisoned in Libya are very limited. For an exceptionally rare report of a French national being pushed back, see Renata Brito, *From Turkish Jail, French Woman Accuses Greece of "Pushback"*, AP NEWS (Feb. 18, 2022), <https://apnews.com/article/middle-east-france-prisons-greece-europe-1c58212ff10310deebae2b769d31e386>. The Turkish ethnicity of the victim is an important part of the story showcasing the racialized nature of the crime.

³⁸ GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND REAL LIFE* (1998).

³⁹ GERRIT W. GONG, *THE STANDARD OF "CIVILIZATION" IN INTERNATIONAL SOCIETY* (1984). Cf. HANS ULRICH JESSURUN D'OLIVEIRA, *NATIESTAAT EN KOLONIALISME: EEN ONGEMAKKELIJK VERBOND* (2023).

⁴⁰ Kochenov, *supra* note 23.

⁴¹ DIMITRY V. KOCHENOV, *CITIZENSHIP* (2019).

⁴² See AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY* (2009).

of “super citizenship”⁴³ from the second or third-tier nationality statuses of the rest of the world population, replacing rights with liabilities.⁴⁴

In a world where inequalities are spatialized,⁴⁵ citizenship, as the boundary-focused institution premised on exclusion,⁴⁶ came to play a role as the key tool in the establishment and reinforcement of global inequalities.⁴⁷ The world’s passport poor are locked into the formerly colonized spaces of no opportunity, while the world’s super citizens—EU and US nationals, along with a few others—benefit from increasing inter-citizenship rights which radically amplify the opportunities they enjoy outside of the territory under the sovereign control of the authority which issued their citizenship in the first place.⁴⁸ The global operation of citizenship and migration law based on this blood aristocracy principle is truly harsh,⁴⁹ retracing the racialized prejudices and the divisions between the colonizers—such as the numerous EU Member States⁵⁰—and the colonized.⁵¹ The life chances of the victims of citizenship are undermined in a “natural” setup of citizenship-based exclusion from dignity and rights: the majority of the excluded happen to be the racialized former colonials. International and national migration and citizenship laws around the world, taken together, are there to ensure that improving one’s life chances through legal migration is usually near-impossible,⁵² and “illegal” migration is severely controlled, criminalized and punished.⁵³

⁴³ See KOCHENOV, *supra* note 41, at 239 *et seq.*

⁴⁴ YOSHI HARPAZ, CITIZENSHIP 2.0: DUAL NATIONALITY AS A GLOBAL ASSET (2019); QUALITY OF NATIONALITY INDEX (DIMITRY KOCHENOV & JUSTIN LINDEBOOM eds., 2020); Dimitry Kochenov & Justin Lindeboom, *Empirical Assessment of the Quality of Nationalities* 4 EUR. J. OF COMPAR. L. & GOV. 314 (2017).

⁴⁵ BRANKO MILANOVIĆ, GLOBAL INEQUALITY (2016).

⁴⁶ ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY (1992); CHRISTIAN JOPPKE, CITIZENSHIP AND IMMIGRATION (2010).

⁴⁷ See MILANOVIĆ, *supra* note 45; BRANKO MILANOVIĆ, CAPITALISM, ALONE (2019); Kochenov, *supra* note 19.

⁴⁸ See Dimitry Kochenov, *Interlegality – Citizenship – Intercitizenship*, in THE CHALLENGE OF INTER-LEGALITY 133–135 (JAN KLABBERS & GIANLUIGI PALOMBELLA eds., 2019).

⁴⁹ See Achiume, *Racial Borders*, *supra* note 8; Manuela Boatcă, *Unequal Institutions in the Longue-durée*, in CITIZENSHIP AND RESIDENCE SALES (DIMITRY KOCHENOV & KRISTIN SURAK eds., 2023); MANUELA BOATCĂ, GLOBAL INEQUALITIES BEYOND OCCIDENTALISM (2016).

⁵⁰ See HANSEN & JONSSON, *supra* note 25.

⁵¹ See Boatcă, *Unequal Institutions*, *supra* note 49; de Vries & Spijkerboer, *supra* note 18; Thomas Spijkerboer, *Coloniality and Recent European Migration Case Law*, in MIGRANTS’ RIGHTS, POPULISM AND LEGAL RESILIENCE IN EUROPE (VLADISLAVA STOYANOVA & STIJN SMET eds., 2021); Willem Schinkel, *Against “Immigrant Integration”*, 6 COMPAR. MIGR. STUD. (2018).

⁵² The Gulf states remain a notable exception to this rule. See MILANOVIĆ, *supra* note 45, at 149. In Europe, the immigrant “other” is presumed to be unfit for the civilized society and needing “integration”: Schinkel, *supra* note 51; Willem Schinkel, *The Imagination of “Society” in Measurements of Immigrant Integration*, 36 ETHNIC & RACIAL STUD. 1142 (2013); Adrian Favell, *Integration: twelve propositions After Schinkel*, 7 COMPAR. MIGR. STUD. 21 (2019). See also Dimitry Kochenov, Mevrouw de Jong gaat eten: *EU Citizenship and the Culture of Prejudice* (Eur. U. Institute, Working Paper RSCAS 2011/06, 2011). Cf. SARAH GANTY, L’INTEGRATION DES CITOYENS EUROPEENS ET DES RESSORTISSANTS DE PAYS TIERS EN DROIT DE L’UE (2021).

⁵³ See Kochenov, *supra* note 19.

D. Structure of the argument that follows

This article is further divided into five parts to provide a concise yet multifaceted overview of the EU's passport apartheid and to map the core aspects of the EU's lawlessness law in action. Part II asks for whom the EU is designed. It documents the near complete exclusion of non-EU citizens lawfully or unlawfully present in the EU. The European Union excludes them from supranational rights and EU-wide law as such. Indeed, the "working-living space,"⁵⁴ which the EU shapes through the area of freedom, security and justice is offered to "citizens,"⁵⁵ thus outlined on the basis of possession of a nationality of one of the Member States of the Union.⁵⁶ This starting position, fetishizing the personal status of legal attachment to the Union, makes the European integration project, with its law's particularly neo-feudal nature,⁵⁷ the best case study of passport apartheid in the world, since no other legal system is as explicit in excluding non-nationals from the most essential rights, let alone hiding its very existence from them as a consequential legal reality.⁵⁸

Part III documents the situation of non-citizens of the EU outside the Union, thus moving to document the harshest areas of the lawlessness regime which the EU and the Member States have built to make sure that the EU's passport apartheid knows no significant exceptions and works as designed: sharply excluding all the racialized former colonials and other passport poor from the global south from any usable rights in the internal market and the Union as a whole. Only minimal exceptions apply, as we shall see.

The Parts that follow then turn to the techniques of EU's lawlessness law in operation, with a particular interest in how the EU organizes international cooperation, aimed at erasing rights and dehumanizing the racialized passport poor, including the EU's own former colonials. Part IV focuses on "soft law" deals, including readmission arrangements and the EU-Turkey and EU-Tunisia agreements as paradigmatic examples of the building blocks of the alternative legal reality that the EU establishes for migrants from the global south, which could never be applicable to "Western" populations. Part V discusses how billions of euros of public money are spent in the absence of any accountability to fund lawless violence installed by the Union and its Member States at its external borders. Part VI offers a case-study of FRONTEX to further illustrate the main techniques deployed by the EU's lawlessness law to ensure that responsibility and accountability for grave violations of rights remains ephemeral serving the needs of the unhindered operation of EU's passport apartheid.

⁵⁴ See Oxana Golyner, *European Union as a Single Working-Living Space*, in THEORISING THE GLOBAL LEGAL ORDER 151 (ANDREW HALPIN & VOLKER ROEBEN eds., 2009).

⁵⁵ TFEU art. 3(2).

⁵⁶ Martijn van den Brink & Dmitry Kochenov, *Against Associate EU Citizenship*, 57 J. OF COMMON MKT. STUD. 1366–82 (2019); Dmitry Kochenov, *EU Citizenship: Some Systemic Constitutional Implications*, in EUROPEAN CITIZENSHIP UNDER STRESS (NATHAN CAMBIEN ET AL. eds., 2020).

⁵⁷ Dmitry Kochenov, *Neo-Mediaeval Permutations of Personhood in the European Union*, in CONSTRUCTING THE PERSON: RIGHTS, ROLES, IDENTITIES IN EU LAW 133–158 (LOÏC AZOULAI ET AL. eds., 2016); Dmitry Kochenov, *The Citizenship of Personal Circumstances in Europe*, in QUESTIONING EU CITIZENSHIP 37–56 (DANIEL THYM ed., 2018). Cf. Robert van Krieken 2023. *Refeudalization and Law* 19 ANN. REV. L. & POL. SCI. 337 (2023).

⁵⁸ Pierre Bourdieu, *The Force of Law*, 38 HASTINGS L. J. 814 (1987).

Although EU lawlessness law unquestionably enters the ambit of “cimmigration,”⁵⁹ it is much more than that. Accordingly, our aspiration is more general: to delve into the key aspects of EU lawlessness law, which allows the deployment of the law in Europe, to ruin hundreds of thousands of lives and commit mass crimes—directly or via proxies—in total impunity, while offering the Member States a safe harbor against accountability or the Rule of Law, as well as democratic, moral, or ethical challenges, while billions are invested in keeping the criminal system of violent racialized abuse running. Lawlessness law is the law of “not us,” making sure countless people “not like us” are subjected to unimaginable suffering in full compliance with the values of the Union and the strict standing requirements at the ECJ.

II. WHO IS THE EU FOR? EUROWHITENESS BETWEEN BENEVOLENCE, EXCLUSION, AND INDIFFERENCE

The European Union is designed as a constitutional system to offer directly enforceable rights to Europeans, making such rights part of the citizens’ “legal heritage,” if we recall *van Gend en Loos*.⁶⁰ The core rights on offer from the very beginning amounted to the freedom of movement in the whole territory of the internal market and the right not to be discriminated against on the basis of nationality, which Gareth Davies believed *de facto* “abolished”⁶¹ the nationalities of the Member States, as these could no longer be legally consequential within the scope of application of EU law (beyond establishing the bridge to EU citizenship, that is).⁶² As designed, the Union was supposed to exclude from rights the racialized colonials of the colonized parts of Eurafrica⁶³ and its Member States’ other overseas possessions.⁶⁴ To agree with Hanna Eklund, the original blueprint of the current Union showcases “a way of thinking and a mode of societal organization that does not start from the premise that all human beings deserve equal protection under the laws to which they are subjected.”⁶⁵ This remains the crucial starting point for the EU’s constitutionalism still today.

The pressure exerted on the UK to exclude its own colonial subjects with British documents from the scope of free movement rights is unquestionably a direct

⁵⁹ See for instance Maartje van der Woude et al., *Crimmigration in Europe*, 14 EUR. J. OF CRIMINOLOGY 3 (2017).

⁶⁰ *van Gend en Loos v. Nederlandse administratie der belastingen*, Case 26/62, EU:C:1963:1.; See also: Dimitry Kochenov, *The Citizenship Paradigm* 15 CAM. Y. EUR. LEG. STUD. 197 (2013).

⁶¹ Gareth Davies, “*Any Place I Hang My Hat?*” or: *Residence is the New Nationality* 11 EUR. L.J. 43 (2005).

⁶² Dimitry Kochenov, *Rounding up the Circle: The Mutation of Member States’ Nationalities under Pressure from EU Citizenship* 1 (EUI Working Paper RSCAS No 2010/23, 2010).

⁶³ HANSEN & JONSSON, *supra* 25; Dominique Custos, *Implications of the European Integration for the Overseas*, in EU LAW OF THE OVERSEAS (DIMITRY KOCHENOV ed., 2011).

⁶⁴ Kochenov, *supra* note 25; For more on the territorial configuration at the time of inception of the integration project, see Dimitry Kochenov, *The Application of EU Law in the EU’s Overseas Regions, Countries, and Territories*, 20(2) MICH. ST. J. OF INT’L L., 669 (2012); Dimitry Kochenov et al., *De Caribische koninkrijksgebieden en de Europese Unie* 26 TAR JUSTICIA 10 (2010).

⁶⁵ Eklund, *supra* note 32, at 833.

reflection of the same logic,⁶⁶ as was the ECJ's *Kaur* case law,⁶⁷ indirectly endorsing this racist policy, which left the UK condemned by the European Commission of Human Rights,⁶⁸ at the expense of any inclusive interpretation of EU citizenship law.⁶⁹

The original Treaties, premised on the need to continue the colonization project,⁷⁰ did not unequivocally frown upon such race-based exclusion from rights. Significant change came with the success of decolonization and the departure of the absolute majority of the former colonies whose populations the drafters of the original Treaties wanted to bar from any of the rights offered by the European integration project. The failure of one of the two objectives of the Schuman Declaration—decolonization made continued large-scale colonialism impossible—has thus by itself solved one of the key drafting problems faced by the founding fathers of Europe in the 1950s: there was no longer any need to discriminate openly on the basis of race, since the colonies with their brown inhabitants bearing European documents of different kinds receded from sight. Falling back on “citizenship” pure and simple could work well in guaranteeing the adherence to the original Eurowhiteness ideal that only a “ethnically and racially European population”⁷¹ should benefit from the integration project.⁷² The outcome of this long-term policy, if we trust Hans Kundnani, is the gradual transformation of the Eurowhiteness colonial ideal into a supranational cosmopolitanism trope—the *faux* cosmopolitanism of white Europeans, turning the EU into the first supranational ethno-nationalist entity.⁷³ Ethno-nationalism of this kind unites the Member States and is styled as the “European way of life,” which is often “in need of protection.”⁷⁴

The EU passport apartheid framework is at its best inside the EU to ignore non-citizens, by making unavailable to them—as a fundamental starting point of the Union's constitutional system—the core rights, principles, and the very territory of the Union.⁷⁵ This legal framework is marked by absolute nationality-based segregation and goes to the foundational heart of the internal market and the original four

⁶⁶ The UK famously obliged, bringing two Declarations on nationality to exclude the absolute majority of its non-white subjects from the scope of application of European law via moving them outside the personal scope. Questionable from the point of view of EU law, the Declarations were fully endorsed (albeit indirectly) by the Court in *Kaur* (The Queen v. Sec'y of State for the Home Dep't ex parte Manjit Kaur, Case C-192/99, EU:C:2001:106), as will be discussed below. See: Kochenov, *supra* note 33, at 186-192; Gérard-René de Groot, *Towards a European Nationality Law*, 8 ELECTRONIC J. COMP. L. (unpaginated) (2004), <http://www.ejcl.org/83/art83-4.html>; Plender, *supra* note 77.

⁶⁷ *Kaur*, EU:C:2001:106.

⁶⁸ *East African Asians v. UK*, app. nos. 4403/70 et al. (1973) 3 E.H.R.R. 76. See, for the background story, Anthony, Lord Lester of Herne Hill, *Thirty Years on: The East African Case Revisited* 52 PUB. L. 55 (2002).

⁶⁹ Kochenov, *supra* note 33.

⁷⁰ As rooted in the Schuman Declaration: ‘With increased resources Europe will be able to pursue the achievement of one of its essential tasks, namely, the development of the African continent.’

⁷¹ Eklund, *supra* note 32, at 843.

⁷² On contemporary citizenship as a successful legal tool to render global racism kosher, see KOCHENOV, *supra* note 41, at 96-104.

⁷³ KUNDNANI, *supra* note 14.

⁷⁴ See Daniel Trilling, ‘Protecting the European Way of Life’ from Migrants Is a Gift to the Far Right, *The Guardian* (13 Sept. 2019) <https://www.theguardian.com/commentisfree/2019/sep/13/protecting-europe-migrants-far-right-eu-nationalism>.

⁷⁵ Dmitry Kochenov & Martijn van den Brink, *Pretending There Is No Union: Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU*, in DEGREES OF FREE MOVEMENT AND CITIZENSHIP 66 (DANIEL THYM & MARGARITE ZOETEWIJ TURHAN eds., 2015).

freedoms, but is infinitely more complex than stating that a worker rendered stateless by Latvia following the break-up of the Soviet Union—although permanently settled in Latvia on a “non-citizen” document—should not be entitled to freedom of movement;⁷⁶ or that a Nigerian should be jailed for driving with a Greek driver’s license in Brussels because EU law does not apply to him, while Europeans in an identical situation are protected by their EU law from disproportionate punishments.⁷⁷

The approach to the personal scope of European law at its inception was thus both markedly colonialist and post-modern at the same time, as the non-discrimination on the basis of nationality at the heart of EU law is unquestionably a move in the direction of a slow undoing of the constitutional essentials of the Member States.⁷⁸ Simultaneously, however, the ideal “European” which emerges during the early decades of European integration remains decidedly white.⁷⁹ First foreigners and brown colonial natives and later—following the departure of the colonies—all non-citizens *tout court*, are strictly excluded from the European legal order in its entirety, and this from its very inception. This includes EU citizenship, EU free movement of persons and EU non-discrimination on the basis of nationality. Only the individual Member States exist for such people—not EU law as a constitutional system of rules distributing rights in a single working-living space encompassing the twenty-seven Member States. The colonial project designed as a Eurowhiteness cosmopolitanism has thus received its contemporary articulation as a move *away* from racism on the books, which coincided with decolonization, but in a manner which resulted in a deeply divided and layered legal system based on the imperative assumption of a principled inequality before the law among the different inhabitants of the territory under its control.

A. Principled exclusion of non-citizens from the European legal order

In addition to the racist-colonialist premises of the early free movement of persons law, the precise scope of the core internal market rights in Europe was not made clear from the beginning and took its contemporary shape from a complex evolution which made the resulting EU citizenship both less racist than its original “free movement of persons” counterpart, and more orthodox at the same time, in that all non-citizens, no

⁷⁶ See generally INETA ZIEMELE, STATE CONTINUITY AND NATIONALITY: THE BALTIC STATES AND RUSSIA (2005); Aleksejs Dimitrovs & Vadim Poleshchuk, *Kontinuitet kak osnova gosudarstvennosti i etnopolitiki v Latvii i Ēstonii*, in *ĒTNOPOLITIKA STRAN BALTII* (VADIM POLESHCHUK & VALERY STEPANOV eds., 2013); Dimitry Kochenov & Aleksejs Dimitrovs, *EU Citizenship for Latvian “Non-Citizens”*, 38 HOUSTON J. OF INT’L L. 1 (2013).

⁷⁷ Criminal Proceedings Against Ibiyinka Awoyemi, Case C-230/97, EU:C:1998:521, ¶ 29. Compare with the treatment of the same facts in Skanavi & Chryssanthakopoulos, Case C-193/94, EU:C:1996:70. Although the legal framework of mutual recognition of drivers’ licenses has changed in the EU, the strict presumption of non-application of key EU law to non-Europeans remains. Cf. Chloe Hublet, *The Scope of Article 12 of the Treaty of the European Communities vis-à-vis Third-Country Nationals: Evolution at Last?*, 15 EUR. L.J. 757 (2009); Kees Groenendijk, *Citizens and Third-Country Nationals: Differential Treatment or Discrimination?*, in *L’AVENIR DE LA LIBRE CIRCULATION DES PERSONNES DANS L’U.E.* 85 (JEAN-YVES CARLIER ET AL. eds., 2006); Pieter Boeles, *Europese burgers en derdelanders: Wat betekent het verbod van discriminatie naar nationaliteit sinds Amsterdam?* 12 SOCIAAL-ECONOMISCHE WETGEVING 502 (2005); Richard Plender, *Competence, European Community Law and Nationals of Non-Member States*, 39 INT’L & COMPAR. L. Q. 599 (1990).

⁷⁸ Kochenov, *supra* note 56.

⁷⁹ HANSEN & JONSSON, *supra* note 25; Eklund, *supra* note 32.

matter how stable their legal status in the Member States, ended up being excluded by default from the rights enjoyed by EU citizens, with only a handful of limited exceptions. The result is a supranational law which is essentially unavailable as far as the most important rights are concerned, either in whole or in part, to anyone not in possession of EU citizenship. Consequently, a change in citizenship from European to a non-EU (think of Brexit, for instance)⁸⁰ results, in the absolute majority of cases, in the sudden and complete disappearance of the whole operation of the most essential elements of the European legal order vis-à-vis the non-citizen, even if the latter is permanently settled in the EU.⁸¹

The treatment of foreigners in the EU deteriorated significantly from the moment Étienne Balibar diagnosed the situation of third-country nationals in the EU as “*une population infériorisée en droits, donc aussi en dignité*.”⁸² Indeed, it is essential to make a clear connection between the Balibarian apartheid diagnosis that predated the worst—torture and killings en masse—and the very rationale underpinning of the EU legal system’s engagement with the persons, which excluded non-citizens from core rights virtually from the start of the European integration project. It requires a clear intention that the law should not be for the foreigner to rely upon, for the Union to progress from denying the foreigner dignity to pushing her back into the open sea.

Importantly, while citizenship is a usual “natural” justification for differentiated treatment,⁸³ the inferiorization at issue does not merely concern exclusion from certain rights reserved uniquely for citizens. Rather, it is about applying an entirely different legal reality to third-country nationals. They are offered a legal reality based on the misrepresentation of European law and politics, diminishing the importance of the European Union vis-à-vis its Member States. The denial of the achievements and the most foundational aspects of the construction of the constitution of the Union in Europe in the context of dealing with foreigners is a cynical exercise, which contributes a great deal to othering and humiliation. J.H.H. Weiler is right: “Nationality as referent for interpersonal relations, and the human alienating effect of Us and Them are brought back again.”⁸⁴ The context of exclusion has only intensified since the publication of his analysis more than thirty years ago.

The central element to all European approaches to third-country nationals (barring European Economic Area (EEA) and Swiss nationals) and their direct EU law rights consists in pretending that the European Union is simply not there. What is at stake is a consistent approach to the EU’s own achievements and the new legal-political reality being brought to life in Europe. Consequently, third-country nationals are *never* in possession of the same rights as EU citizens in the EU, no matter how secure their settlement status in a particular Member State. Non-EU citizens will mainly possess EU rights stemming from three sources: derivative rights through a family connection with an EU citizen, but also via the company they work for;⁸⁵ international agreements

⁸⁰ Dimitry Kochenov, *EU Citizenship and Withdrawals from the Union*, in TROUBLED MEMBERSHIP 257 (CARLOS CLOSA ed., 2017). Cf. van den Brink & Kochenov, *supra* note 56.

⁸¹ Criminal proceedings v. Michelle Ferrer Laderer, Case C-147/91, EU:C:1992:278, ¶ 7.

⁸² Balibar, *supra* note 30, at 192.

⁸³ KOCHENOV, *supra* note 25.

⁸⁴ Joseph H.H. Weiler, *The Transformation of Europe* 100 YALE L.J. 2403, 2481 (1991).

⁸⁵ Parliament and Council Directive 2004/38/EC, On the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States Amending

concluded by the Union and the Member States with the third countries—especially the EEA and EU-Swiss agreements;⁸⁶ or a common immigration and asylum policy.⁸⁷ The immigration and asylum secondary law includes the long-term resident status enshrined in Council Directive 2003/109/EC created as a watered-down response to the Tampere European Council Presidency Conclusions;⁸⁸ the family reunification status which provides its beneficiaries with derivative rights and is based on family connections with a third-country national settled in the EU;⁸⁹ statuses based on sectoral legislation—i.e. student, researcher or worker (including highly-skilled and seasonal workers);⁹⁰ and finally third-country nationals benefitting from refugee or a subsidiary protection status.⁹¹ A group standing apart are the Ukrainians benefitting from the Temporary Protection Directive following its activation in relation to this group shortly after the full-scale Russian invasion.⁹²

The number of overlapping statuses for non-citizens of the Union forms a highly complex web of entitlements and obligations,⁹³ creating a picture of astounding sophistication.⁹⁴ As a result, after excluding non-citizens benefiting from EU rights indirectly via a family or company, the EU as a single legal system and the internal market as a territory of opportunity only exist for third-country nationals under international agreements with the EEA countries and with Switzerland and those, albeit to a smaller degree, benefitting from the temporary protection regime—like the

Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance), 2004 O.J. (L 158) 1. Some derivative rights for third-country nationals can also result from employment relationship with a company using its right to provide services in the Member State other than its own (*Raymond Vander Elst v. Office des Migrations Internationales*, Case C-43/93, EU:C:1994:310, ¶21; *Rush Portuguesa Lda v. Office National D’immigration*, Case C-113/89, EU:C:1990:142, ¶12; *Société anonyme de droit français Seco and Société anonyme de droit français Desquenne & Giral v. Etablissement d’assurance contre la vieillesse et l’invalidité*, joined cases 62 & 63/81, EU:C:1982:34); *Kochenov & van den Brink*, *supra* note 75.

⁸⁶ The European Economic Area Agreement, 1997 O.J. (L1) 1; Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, 2002 O.J. (L114) 6.

⁸⁷ TFEU, arts 78(1) & 79(1).

⁸⁸ Council Directive 2003/109/EC, Concerning the status of third-country nationals who are long-term residents, 2003 O.J. (L 16) 44.

⁸⁹ Council Directive 2003/86/EC, On the Right to Family Reunification, 2003 O.J. (L 251) 1.

⁹⁰ Parliament and Council Directive (EU) 2016/801, On the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Research, Studies, Training, Voluntary Service, Pupil Exchange Schemes or Educational Projects and Au Pairing (recast), 2016 O.J. (L 132) 1; Parliament and Council Directive 2014/36/EU, On the Conditions of Entry and Stay of Third-Country Nationals for the Purpose of Employment as Seasonal Workers, 2014 O.J. (L 94) 1; Parliament and Council Directive (EU) 2021/1883, On the Conditions of Entry and Residence of Third-Country Nationals for the Purpose of Highly Qualified Employment, and Repealing Council Directive 2009/50/EC, 2021 O.J. (L 382) 1.

⁹¹ Parliament and Council Directive 2011/95/EU, On Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast), 2011 O.J. (L 337) 1.

⁹² The treatment of Russian citizens fleeing dictatorship and the same war has been a radically different matter: Sarah Ganty et al., *Unlawful Nationality-Based Bans from the Schengen Zone*, 48 YALE J. INT’L L. ONLINE 1 (2023).

⁹³ Pavlos Eleftheriadis, *Citizenship and Obligation*, in PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW (JULIE DICKSON & PAVLOS ELEFTHERIADIS eds., 2012) 159; Dimitry Kochenov, *EU Citizenship without Duties* 20 EUR. L.J. 482 (2014).

⁹⁴ See Kochenov & van den Brink, *supra* note 75.

Ukrainians today; as long as that lasts, that is. The rest of the EU framework which purports to tackle non-citizens' rights is nothing more than an integral part of the Union's "disappearing act": it is all about the Member States and the rights available in the territory of the Member States, excluding the very idea of the EU as a matter of principle.

Ironically, not only non-citizens are excluded, however, as plenty of Europeans who cannot establish a connection with the internal market—following the dominant judge-made orthodoxy—are also excluded from a significant share of rights, most notably from non-discrimination on the basis of nationality⁹⁵ (at least until they move country, if they can). The personal scope of the EU as a constitutional system is thus truly complex⁹⁶ and, atypically for a modern constitutional system, neo-feudal in nature,⁹⁷ in that the application of EU law to a given individual depends on the individual's personal life history—travel, education, family connections and territorial location—rather than the status of nationality *per se*. The idea of equality before the law thus emerges as a truly ephemeral promise.⁹⁸

Former colonials, who would be strictly excluded under the original thinking behind the Eurafrica project, *are* granted rights, however, as long as they can present an EU passport. That said, racialized "*alochtonous*" Europeans of colonial origin can be stripped of EU citizenship more easily, following the Court's surprising turn against multiple citizenships.⁹⁹

B. EU citizenship and non-nationals of the Member States

Notwithstanding the fact that Article 9 TEU states that "every national of a Member State shall be a citizen of the Union,"¹⁰⁰ the meaning of "nationality" in this provision is not defined at EU level and is a sovereign competence of the Member States to establish.¹⁰¹ In *Kaur* the ECJ clarified, albeit indirectly, that the Member States are free to create special categories of nationals, which would not benefit from

⁹⁵ See ALINA TRYFONIDOU, *REVERSE DISCRIMINATION IN EU LAW* (2009); Kochenov & Plender, *supra* note 26; Dimitry Kochenov, *Citizenship without Respect* 1-105 (Jean Monnet Working Papers No. 08/10 2010); Dimitry Kochenov, *A Real European Citizenship*, 18(1) COLUM. J. EUR. L. 55 (2011).

⁹⁶ See Spaventa, *supra* note 27; Caro de Sousa, *supra* note 26.

⁹⁷ See the literature cited *supra* in note 57.

⁹⁸ See ALEXANDER SOMEK, *KNOWING WHAT THE LAW IS* (2021); Kochenov, *Citizenship without Respect*, *supra* note 95.

⁹⁹ In addition to EU citizenship such individuals usually hold citizenships of the former colonies acquired by birth, which are used by EU Member States to facilitate stripping these individuals of their EU nationality and rights. The ECJ does not doubt the legality of this phenomenon without focusing on the racial undertones of such a policy without any demonstrable aim: Dimitry Kochenov & David de Groot, *Helpful, Convolved, and Ignorant in Principle*, 47 EUR. L. REV. 699 (2022); Katja Swider, *Legitimising Precarity of EU Citizenship*, 57 COMMON MKT. L. REV. 1163 (2020); Dimitry Kochenov, *The Tjebbes Fail* 4 EUR. PAPERS 319 (2019).

¹⁰⁰ See Dimitry Kochenov & Tobias Lock, *Article 9*, in *THE EU TREATIES AND THE CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY* 34-37 (1st Vol. MANUEL KELLERBAUER ET AL. eds., 2nd ed. 2024).

¹⁰¹ See *Janko Rottman v. Freistaat Bayern*, Case C-135/08, EU:C:2010:104; *Mario Vicente Micheletti et al. v. Delegación del Gobierno en Cantabria*, Case C-369/90, EU:C:1992:295; *Kaur*, EU:C:2001:106; Stephen Hall, *Determining the Scope ratione personae of European Citizenship* 28 LEG. ISS. OF ECON. INTEGR. 355-360 (2001). Cf. Dimitry Kochenov, *Annotation of Rottmann* 47 COMMON MKT. L. REV. 1831 (2010).

EU citizenship.¹⁰² The Court recognized the validity of the unilateral limitations implied in distinguishing “nationality” from a “nationality for Community purposes” in the Declarations appended by some Member States, most notably Germany and the UK, to the Treaties.¹⁰³ As a consequence, only “nationals for the purposes of Community law” became EU citizens, codifying a problematic approach of *de facto* racist exclusion introduced to avoid extending supranational-level rights to racialized colonials with formal legal links to the UK. While the whole idea of taking such unilateral Declarations seriously provoked scholarly criticism,¹⁰⁴ after *Kaur* this became the law.¹⁰⁵ EU citizenship is thus a result of the full incorporation of the earlier Eurowhiteness approach and shaping internal market law into the new realm of the revamped European personhood, created by the Treaty of Maastricht.¹⁰⁶ The result is a supranational citizenship that is even narrower still, at least in theory, than the nationalities of the Member States, thus not only excluding all non-nationals, but also leaving the Member States the freedom to create sub-categories of citizens not benefitting from EU law.¹⁰⁷ The UK carved such a sub-category out based on race; Latvia—based on ethnicity; a great deal is possible in this context, as citizenship law is largely placed beyond the scope of prohibitions of discrimination as global practice shows.¹⁰⁸

C. *The scope of free movement rights in the EU*

Before the formal inclusion of the status of European citizenship into the text of the Treaties at Maastricht, the European Economic Community Treaty was silent about which categories of persons residing in the territory of the European Communities¹⁰⁹ could benefit from Community workers’ free movement and residence rights,¹¹⁰ and to transfer this right to derivative categories of recipients;¹¹¹ beyond the fact that the Eurowhiteness ideal had to be adhered to, that is.¹¹² The “informal *acquis*” on the matter—a set of practices and unwritten rules—was growing

¹⁰² See *Kaur*, EU:C:2001:106.

¹⁰³ See Kochenov & van den Brink, *supra* note 75; Treaty of Accession to the European Communities of the Kingdom of Denmark, Ireland, and the United Kingdom of Great Britain and Northern Ireland, Jan. 22, 1972, 1972 O.J. (L 73) [hereinafter 1st U.K. Declaration]. It was later updated upon the entry into force of the 1981 British Nationality Act. *E.g.* G.-R. de Groot, *supra* note 66; Andrew C. Evans, *Nationality Law and the Free Movement of Persons in the EEC*, 2 Y. EUR. L. 173, 189 (1982); Kenneth Simmonds, *The British Nationality Act 1981 and the Definition of the Term “National” for Community Purposes*, 21 COMMON MRKT. L. REV. 675 (1984). See also Akoth G. Toth, *The Legal Status of the Declarations Attached to the Single European Act*, 23 COMMON MRKT. L. REV. 803 (1986) (on the legal effect of declarations in EU law).

¹⁰⁴ Richard Plender, *An Incipient Form of European Citizenship*, in EUROPEAN LAW AND THE INDIVIDUAL (Francis G. Jacobs ed., 1976). See also Kochenov & Plender, *supra* note 26.

¹⁰⁵ *Kaur*, EU:C:2001:106.

¹⁰⁶ Kochenov & Plender, *supra* note 26.

¹⁰⁷ For a detailed analysis, see Kochenov, *supra* note 33.

¹⁰⁸ Michelle Foster & Timnah Rachel Baker, *Racial Discrimination in Nationality Laws: A Doctrinal Blind Spot of International Law?*, 11 COLUM. J. RACE L. 83 (2021).

¹⁰⁹ This concept used to be contested, developing hand-in-hand with decolonization: Eklund, *supra* note 32 Cf. Kochenov, *supra* note 25.

¹¹⁰ MAAS, *supra* note 25.

¹¹¹ *Id.*; Kochenov & Plender, *supra* note 26.

¹¹² Eklund, *supra* note 32, at 843.

fast, however.¹¹³ Since there was no reference to the requirement to possess a Member State nationality in the Treaties, “the Treaty could be [and should have been] interpreted in such a way as to cover all the workers legally resident in the Union, not only those in possession of the Member State’s nationality for Union law purposes,”¹¹⁴ as one of us argued along with Martijn van den Brink. Yet the first regulations on workers’ free movement as interpreted by the ECJ adopted a very narrow view of the Treaty, by considering the possession of a Member State nationality as a *conditio sine qua non* for benefiting from the freedom of movement in the territory of the Communities.¹¹⁵ Some authors have been particularly critical of this approach, which could be regarded as “inconsistent with the goals of the Common Market,”¹¹⁶ as Michael Becker put it. There seems to be no rational economic reason for the borderless Market not to recognize the freedom of movement of EU citizens and lawfully settled third-country nationals alike.¹¹⁷ A worker is a worker, or at least should be, and inventing borders specifically for the category of workers with a particular set of passports while they contribute to the internal market project in the same way as other Europeans seems irrational, to say the least. And indeed, it would appear that some other freedoms are more aligned with the officially stated goals of the internal market: the free movement of goods, in one example, applies to all the goods legally in the territory of the Union.¹¹⁸ Services provide the contrary example, however. The Court offered a literal interpretation of the relevant restrictive Treaty provision early on:¹¹⁹ a Member State nationality was essential to benefit from this type of free movement.

The territory of the Union as a single space where fundamental rights and protections are offered to all those settled does not exist, therefore, for those who are not in possession of a Member State passport, no matter how much time they spent in the Union and how permanent their stay in the territory of one of the Member States was. EU free movement law as designed is blind to these people.

D. The scope of non-discrimination on the basis of nationality in the EU

Non-discrimination on the basis of nationality¹²⁰ and freedom of movement evolved hand-in-hand. The link between the two is so intricate that it can also be found in the provisions of the Treaties related to other freedoms. Indeed, it is settled case law that discrimination on grounds of nationality is liable to restrict freedom of

¹¹³ See ANTJE WIENER, “EUROPEAN” CITIZENSHIP PRACTICE (1997); Matthew J. Elsmore & Peter Starup, *Union Citizenship – Background, Jurisprudence, and Perspective*, 26 Y. EUR. L. 57 (2007).

¹¹⁴ Kochenov & van den Brink, *supra* note 75.

¹¹⁵ *Id.*; see also Kochenov & Plender, *supra* note 26.

¹¹⁶ See Michael Becker, *Managing Diversity in the European Union*, 7 YALE HUM. RTS. & DEV. 132, 138 (2004).

¹¹⁷ See G Blanke & A MacGregor, *Free Movement of Persons within the EU: Current Entitlements of EU Citizens and Third-country Nationals – A Comparative Overview* 8 INT’L TRADE L.REV. 173 (2002). See also, Martin Hedemann-Robinson, *Third-Country Nationals, European Union Citizenship, and Free Movement of Persons*, 16 Y. EUR. L. 321 (1996).

¹¹⁸ TFEU art. 29.

¹¹⁹ *Laderer*, Case C-147/91, EU:C:1992:278, ¶7.

¹²⁰ See TFEU art 18. See also GARETH DAVIES, NATIONALITY DISCRIMINATION IN THE EUROPEAN INTERNAL MARKET, 9–20 (2003); Boeles, *supra* note 77.

movement.¹²¹ Like the EU law on the free movement of persons, the Treaties do not contain a list of nationalities to which the non-discrimination norm should apply and there is every good reason—as outlined by Pieter Boeles years ago¹²² and developed by others¹²³—to extend this prohibition to cover all nationalities for all settled foreigners. Living a dignified life in the Union is not a border control issue, which should apply only at the point of entry.¹²⁴ Abandoning the current discriminatory perspective would move the EU closer to the leading democracies around the world, which do not impose any citizenship-based distinction in their treatment of settled foreigners with respect to the majority of their laws.¹²⁵ Indeed, the same is true within the EU, at the Member State level, both by virtue of EU and national law: discrimination against non-citizens—at least those who are sufficiently settled—is not ok.¹²⁶ So far, achieving this basic change at the Union level remains wishful thinking, even though the Treaties again do not prohibit—albeit also do not mandate—an interpretation consistent with the mainstream international standards, which are also respected by the Member States.

Indeed, equal treatment has always been doctrinally placed at the heart of the European integration project as Sir Richard Plender recalled in 1976, evoking “an incipient form of European citizenship.”¹²⁷ Initially, the principle of non-discrimination on grounds of nationality mainly concerned foreign companies, labor migrants and imports.¹²⁸ As recalled by Chloé Hublet, “it is a condition sine qua non for the creation of a common market among the various European states which have ratified the Treaty of Rome, that neither the nationality of individuals, nor the national origin of goods, services or capital, should be pertinent criteria for the development of this market.”¹²⁹ The formal link between EU citizenship and the prohibition of discrimination on grounds of nationality became steadily more clearly articulated over time at the expense of any expansive interpretation to include non-EU nationals.¹³⁰ Article 21(2) of the Charter of Fundamental Rights of the EU (hereinafter: CFR), which also prohibits discrimination on grounds of nationality, could have been interpreted as being applicable to third-country nationals, especially in light of the corresponding right in Article 14 ECHR.¹³¹ The ECJ, however, drew an equals sign between the scopes of Articles 18 TFEU and 21(2) CFR.¹³² The restrictive application

¹²¹ See *Raugevicius*, Case C-247/17, EU:C:2018:898, ¶¶27–28. See also *TopFit v. Deutscher Leichtathletikverband*, Case C-22/18, EU:C:2019:49, ¶¶29, 44.

¹²² Boeles, *supra* note 77.

¹²³ See the literature cited in note 77.

¹²⁴ Boeles, *supra* note 77.

¹²⁵ *Id.*

¹²⁶ Dmitry Kochenov, *Growing Apart Together: Social Solidarity and Citizenship in Europe*, in RESEARCH HANDBOOK ON EUROPEAN SOCIAL SECURITY LAW, 32, 38–41 (FRANS PENNING & GUISBERT VONK eds., 1st ed. 2015); Mark Bell, *The Principle of Equal Treatment*, in EU LAW. TEXT, CASES, AND MATERIALS 611 (PAUL CRAIG & GRÁINNE DE BÚRCA eds., 2010); Evelien Brouwer & Karin de Vries, *Third-Country Nationals and Discrimination on the Ground of Nationality*, in EQUALITY AND HUMAN RIGHTS: NOTHING BUT TROUBLE? 123 (MARJOLEIN VAN DEN BRINK ET AL. eds., SIM 2015).

¹²⁷ Plender, *supra* note 104.

¹²⁸ Bell, *supra* note 126, at 611–612.

¹²⁹ Hublet, *supra* note 77, at 758.

¹³⁰ *Fourth Commission Report on Citizenship of the Union*, COM (2004) 695 final, 8 ¶ 3(2).

¹³¹ To be taken into account given Charter of Fundamental Rights of the European Union, Dec. 12, 2007, 2007 O.J. (C 303) 1, Article 51(3) [hereinafter CFR]. Cf. Brouwer & de Vries, *supra* note 126.

¹³² *X v. Belgium*, Case C-930/19, EU:C:2021:657, ¶¶50–51.

of the provision significantly reinforces the formal exclusion of third-country nationals from the European integration project, reconfirming the *apartheid européen* framing of the Union, dating back to its colonial inception. Discrimination on the basis of nationality in the EU is the rule in the case of the third-country nationals in the EU.

The absence of protection against discrimination on grounds of nationality has even been used to reduce the scope of protection of other rights for third-country nationals,¹³³ especially discrimination on grounds of racial or ethnic origin.¹³⁴ In *Kamberaj* for instance, the ECJ considered that the difference in treatment between long term residents and nationals regarding housing benefits was based on grounds of nationality and not race or ethnic origin and was therefore not part of the scope of the relevant non-discrimination prohibition.¹³⁵

What is crucial is that by humiliating *all* third-country nationals by *de iure* excluding them from dignity and equality in the context of EU's supranational law by default, the Union unquestionably undermines its own citizenship to a great degree. Observing similar injustices in the context of Germany, Michael Walzer has rightly concluded that “tyrant citizens”¹³⁶ also deprive themselves of dignity when they install a caste injustice system, excluding through othering many of those living among them. EU citizens also emerge as such tyrant citizens: the highest caste in a layered arrangement of legal personhoods, no honest justification for which on moral and ethical grounds being available.

Worse still, the rights that citizens from predominantly “white” countries get in the EU are radically different from the rights that the citizens of racialized spaces get in the Union: whatever the logical reasons and justifications advanced for this might be, we cannot but observe that the EU's law of persons is unequivocally racist.¹³⁷ This fact is not only reflected in the push-back statistics and the growing death toll of non-white victims at the EU's external frontiers,¹³⁸ but also in the treatment of refugees: blond Ukrainians have a radically different legal framework applied to them compared with all other peoples fleeing similar catastrophes at home.¹³⁹ Moreover, while

¹³³ Article 3(2) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin OJ L 180, 19 July 2000, p. 22-26. Sarah Ganty & Karin de Vries, “Non-discrimination in European social security law: exploring safeguards against gender and racial discrimination” in RESEARCH HANDBOOK ON EUROPEAN SOCIAL SECURITY LAW (FRANS PENNING and GUSBERT VONK (eds.) 2023, 2nd ed.) 103-129.

¹³⁴ *Kamberaj*, EU:C:2011:827. As confirmed later in *Land Oberösterreich*, EU:C:2021:155, ¶¶ 58–59

¹³⁵ *Id.* In general, the ECJ defines “race” and “ethnic origin” in a restrictive and static way. *Jyske Finans A/S v. Ligebehandlingsnævnet*, Case C-668/15, EU:C:2017:278. Shreya Atrey, *Race discrimination in EU Law after Jyske Finans*, 55(2) COMM. MRKT L.REV., 625-642 (2018); Karin de Vries, *Woontoeslag voor langdurig ingezetene derdelandse; beperkte definitie rassendiscriminatie*, 18 EUR. HUMAN RTS. CASES UPDATES 1 (2021).

¹³⁶ MICHAEL WALZER, *THE SPHERES OF JUSTICE* (1983).

¹³⁷ The law of any affluent Western democracy reflects the same divide: Kochenov, *supra* notes 40 & 19; Achiume, *Racial Borders*, *supra* note 8; BOATCĂ, *GLOBAL INEQUALITIES*, *supra* note 49.

¹³⁸ European Council for Refugees and Exiles (ECRE), *Central Med: Death Toll Continues to Rise on the Busiest Sea Route to Europe*, ECRE Weekly Bulletin (Mar. 18, 2022), <https://ecre.org/central-med-death-toll-continues-to-rise-on-the-busiest-sea-route-to-europe/>; UN News, *Deaths at sea on migrant routes to Europe almost double, year on year*, United Nations (Apr. 29, 2022), <https://news.un.org/en/story/2022/04/1117292>.

¹³⁹ E.g., Cathryn Costello & Michelle Foster, *(Some) Refugees Welcome: When is Differentiating Between Refugees Unlawful Discrimination?*, 22 INT'L J. DISCR. & L., 244, 245–247 (2022).

Ukraine's crisis is not the EU's doing, many Member States of the EU took active part in the unlawful occupations of Iraq, the useless war in Afghanistan, and the destabilization of Libya and Syria, and now they mistreat the desperate refugees from those places at their own borders.¹⁴⁰ The functioning of Eurowhiteness in practice in Europe today results in a steep division of the law: EU law for the whites is different from EU law for the racialized former colonials: exactly the design the founding fathers intended more than seventy years ago.¹⁴¹

III. EU'S LAWLESSNESS LAW: FROM IGNORING TO KILLING THE OTHER

The most extreme side to the EU's passport apartheid is the treatment of the racialized passport poor at the EU's borders and further afield. Here the EU does not simply disregard the other, following an othering pattern intended to ensure that the colonial natives do not enjoy full rights in Europe. Instead of simply making the non-citizen non-existent in the eyes of the law, in the case of the former colonial passport poor the Union destroys their dignity, humanity and rights to enforce passport apartheid and discourage *any* movement. Outside the territory of the Union, the Union's proxies enslave, torture and kill¹⁴² in an atmosphere of carefully articulated near-absolute lawlessness greenlighted in many instances by the Court of Justice itself and paid for by significant and unaccountable transfers from the EU's public funds. The main policy seems to come down to deterrence of arrivals of the racialized passport poor at any cost, including by making their journeys as dangerous as possible by design in the hope that a fast growing death toll will discourage migration attempts.¹⁴³ The crucial element in the production of lawlessness is EU law itself, which operates in this context as a lawlessness law, by whitewashing mass crimes and breaches of the rights, principles, and values of EU, national, ECHR and international law.

A. A specialized sub-field of EU law to push the racialized passport poor outside of the law

The essential aim of the EU's lawlessness law is to disconnect the very idea of the Rule of Law, human rights, and the most basic transparency and accountability (including in the spending of public funds) from the treatment of the racialized non-citizens outside EU's territory. This is done through the active production of lawlessness by the Commission and partly by the ECJ, with full participation and full knowledge of the Member States.

The lawlessness law makes sure that any racialized "other" lucky enough to get close to the EU will not just be a non-person in the eyes of the EU integration project—which is the standard *apartheid européen* in action as described by Balibar and Weiler. Instead, the other will be drowning in the sea or dying of cold and beatings in the forests at the EU-Belarusian border, in an atmosphere where to endure is against the law, as the lawlessness law simply denies all rights, including the most fundamental rights which shape today's EU legal order, as well as the ECHR and international law.

¹⁴⁰ E.g., Ganty et al., *supra* note 9.

¹⁴¹ Eklund, *supra* note 32, at 843.

¹⁴² See literature cited in note 20.

¹⁴³ SHATZ, *supra* note 12.

The lawlessness law has one mantra: “we are not to blame” and the ECJ, as well as the other EU institutions and the Member States work together to ensure that there is *de facto* no law whatsoever available to protect the racialized other. This is achieved by unleashing the Member States’ own force,¹⁴⁴ FRONTEX,¹⁴⁵ or EU-funded proxies in the lawless spaces¹⁴⁶ to operate with complete impunity by law: legality is thereby presented as being safeguarded as the destruction of the Rule of Law is helped along. The Commission sends unequivocal signals that “suspending” rights is fine,¹⁴⁷ and the case-law fails to capture the systemic nature of the assaults on the rights across the whole frontier,¹⁴⁸ when it does not actively contribute to the deployment of legality against the Rule of Law. This is done through the creation of emergency regimes around borders¹⁴⁹ excused by alleged “instrumentalization” among others,¹⁵⁰ designing and concluding unlawful international agreements attacking the rights of non-citizens as not falling within the scope of EU and international law¹⁵¹ and making

¹⁴⁴ See, e.g., Baranowska, *Pushbacks in Poland*, *supra* note 9. See also Mariagiulia Giuffrè, *State Responsibility beyond Borders*, 24(4) INT’L J. OF REF. L. 692 (2012); Violeta Moreno-Lax, *The Architecture of Functional Jurisdiction*, 21 GERMAN L.J. 385 (2020).

¹⁴⁵ MELANIE FINK, *FRONTEX AND HUMAN RIGHTS: RESPONSIBILITY IN ‘MULTI-ACTOR SITUATIONS’ UNDER THE ECHR AND EU PUBLIC LIABILITY LAW* 3–4 (2019); ROBERTA MUNGIANU, *FRONTEX AND NON-REFOULEMENT. THE INTERNATIONAL RESPONSIBILITY OF THE EU* (2016); Jori P. Kalkman, *FRONTEX: A Literature Review*, 59 INT’L MIGR. 165 (2021); Mariana Gkliati & Jane Kilpatrick, *Crying Wolf Too Many Times: The Impact of the Emergency Narrative on Transparency in FRONTEX Joint Operations*, 17 UTRECHT L.REV. 57 (2021); Iris Goldner Lang & Boldizsár Nagy, *External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement*, 17(3) EUR. CONST. L.REV. 442 (2021).

¹⁴⁶ Urbina, *supra* note 11. See also, e.g., *Migrants Being Sold as Slaves*, CNN (Nov. 13, 2017), <http://edition.cnn.com/videos/world/2017/11/13/libya-migrant-slave-auction-lon-orig-md-ejk.cnn>; Médecins sans Frontières, *supra* note 20; *An emergency for whom? The EU Emergency Trust Fund for Africa – migratory routes and development aid in Africa*, OXFAM (Nov. 15, 2017), https://www-cdn.oxfam.org/s3fs-public/file_attachments/bp-emergency-for-whom-eutf-africa-migration-151117-en_1.pdf.

¹⁴⁷ European Commission, *Asylum and return: Commission proposes temporary legal and practical measures to address the emergency situation at the EU’s external border with Belarus*, Press Release (2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6447. The Commission has proposed a package of several measures including *Commission Proposal for a Council Decision on Provisional Emergency Measures for the Benefit of Latvia, Lithuania, and Poland*, COM (2021) 752 final (Dec. 1, 2021); *Commission Proposal to Amend the Schengen Code* COM (2021) 891 final (Dec. 14, 2021); as well as *Commission Proposal for a Regulation Addressing Situations of Instrumentalisation in the Field of Migration and Asylum* COM (2021) 890 final (Dec. 14, 2021).

¹⁴⁸ Focusing on Hungary, in one example, as the Commission and FRONTEX have done (FRONTEX even suspending its activities in Hungary), while the Commission “authorizes” pushbacks and other undoubtedly illegal practices in the Baltic States and Poland, weakening EU law’s coherence. While the Commission is outright inconsistent, the position of the Court on pushbacks has been clearer: See *Commission v. Hungary*, Case C-808/18, EU:C:2020:1029; *Valstybės sienos apsaugos tarnyba*, Case C-72/22 PPU, EU:C:2022:505.

¹⁴⁹ Aleksandra Ancite-Jepifánova, *Beyond the ‘Hybrid Attack’ Paradigm* (re:constitution Working Paper, 35/2024, 2024).

¹⁵⁰ Ganty et al., *supra* note 9.

¹⁵¹ European Council, Statement of the EU Heads of State or Government (Mar. 8, 2016), <https://www.consilium.europa.eu/en/press/press-releases/2016/03/08/eu-turkey-meeting-statement/>; European Council, EU-Turkey statement (Mar. 18, 2016), <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>. See also NF v. European Council, Case T-192/16, EU:T:2017:128; Bas Schotel, *The EU-Turkey Statement and the Structure of Legal Accountability*, in THE INFORMALISATION OF THE EU’S EXTERNAL ACTION IN THE FIELD OF MIGRATION AND ASYLUM 73 (EVA KASSOTI & NARIN IDRIZ eds., 2022); Enzo Cannizzaro, *Denialism as the Supreme Expression of Realism*, 2 EUR. PAPERS 251 (2017).

sure that the EU money funding the so-called “Libyan Coast Guard” committing atrocities on the EU’s behalf is not subjected to rigorous accountability standards.¹⁵² At the same time, it presents the sharing of intelligence with the EU’s criminal proxies as not occurring officially¹⁵³ and empowers the enslavement and kidnapping of the racialized passport poor for ransom as well as their torture and killing.¹⁵⁴ FRONTEX, operating as the “air force” of the so-called “Libyan Coast Guard,”¹⁵⁵ is thus officially freed of any blame and can hide itself from weak if not fictive human rights due diligence standards,¹⁵⁶ while the Commission gives up as the guardian of the treaties and applauds the Member States’ management of the borders regardless of the atrocities committed there.¹⁵⁷

The EU participates in the killing of dozens of thousands of non-white people in defense of its *de facto* foundational value: the passport apartheid, which lay at the heart of the founding fathers’ understanding of the “development of the African continent,”¹⁵⁸ as Minister Schuman put it in the Declaration we celebrate every May 9. As a fundamental part of Eurowhiteness the *apartheid européen* has been with us since the inception of the project. We observe the harshest biopolitical expressions of Eurowhiteness at sea: if a white person is in trouble, European rescuers are on the scene immediately, while a black passport poor person would have to drown or wait for hours to be “rescued” by the so-called “Libyan Coast Guard” on the EU’s payroll—Europeans are not there to help in such situations.¹⁵⁹ And this in a context where landing anyone saved from the sea in Libya is a criminal offence under the national

¹⁵² OXFAM, *supra* note 146. See also European Court of Auditors, *European Union Emergency Trust Fund for Africa: Flexible but Lacking Focus* (Special Report no. 32, 2018), at 4; Thomas Spijkerboer & Elies Steyger, *European External Migration Funds and Public Procurement Law*, 4(2) EUR. PAPERS 493, 514–518 (2019).

¹⁵³ See Statewatch, *Border Surveillance, Drones and Militarisation of the Mediterranean* (May 6, 2021), <https://www.statewatch.org/analyses/2021/border-surveillance-drones-and-militarisation-of-the-mediterranean/>; Daniel Deibler, *EUROSUR – A Sci-fi Border Zone Patrolled by Drones?*, in *PRIVACY AND IDENTITY MANAGEMENT FOR THE FUTURE INTERNET IN THE AGE OF GLOBALISATION* 87, 88–92 (JAN CAMENISCH ET AL. eds., 2015).

¹⁵⁴ Urbina, *supra* note 11. See also UNSMIL & OHCHR, *supra* note 20, at 58–59.

¹⁵⁵ See Ian Urbina’s talk on EU Citizenship Apartheid at Yale Law School European Law Association seminar on Apr. 29, 2022, speaking about the sharing of FRONTEX surveillance capabilities with the EU’s Libyan proxy militias. *Yale Law School: A Reconceptualization of the Mediterranean Migrant Crisis*, OUTLAW OCEAN PROJECT (May 5, 2022), <https://www.theoutlawocean.com/appearances/yale-law-school-a-reconceptualization-of-the-mediterranean-migrant-crisis/>. See also, Statewatch, *supra* note 153; Deibler, *supra* note 153; Judith Sunderland & Lorenzo Pezzani, *EU’s Drone is Another Threat to Migrants and Refugees*, (Human Rights Watch 2022), <https://www.hrw.org/news/2022/08/01/eus-drone-another-threat-migrants-and-refugees>.

¹⁵⁶ Carla Ferstman, *Human Rights Due Diligence Policies Applied to Extraterritorial Cooperation to Prevent “Irregular” Migration*, 21 GERMAN L.J. 459, 463–465 (2020).

¹⁵⁷ In the Mediterranean the Commission is one of the facilitators and orchestrators of lawlessness law, and at the Eastern border of the Union it is on record as promoting the unlawful ‘instrumentalization’ narrative popular in Poland, Latvia and Lithuania: Ganty et al., *supra* note 9; Ancite-Jepifánova, *supra* note 149.

¹⁵⁸ Count Snoy et d’Oppuers, representing Belgium at the negotiations of the Treaties of Rome, is reported to have raised issue of ‘the social aspect of colonisation’: Eklund, *supra* note 32, at 835. Paul-Henri Spaak, another leading Belgian mind behind the Eurafican integration project was equally committed to the cause (cf. HANSEN & JONSSON, *supra* note 25) – Minister Schuman was voicing the general consensus among the founding Member States at the time.

¹⁵⁹ SHATZ, *supra* note 12.

law of the EU's Member States¹⁶⁰ and is not permitted under ECHR law either,¹⁶¹ given that Libya is far removed from being a functioning country, let alone a "safe third country." EU law is there on to make sure that the EU should not be reproached: we only finance detention centers and provide boats, training and intelligence hinting at whom to hunt at sea—the doing of the deeds is not us. This is lawlessness law in action. The EU thus deploys its legal arsenal to enable absolute violence at the hands of the criminals that it summons and pays, and the delusion of responsibility, while playing a central role in what is being done to the racialized passport poor, who are attacked for no wrongdoing.

B. EU lawlessness law as a violation of the Rule of Law

EU lawlessness law has been quite effective, given how complex its justifications and how criminal its implications are.¹⁶² Its effectiveness can be demonstrated by the fact that the EU has consistently denied any *reality* to the lawlessness it has so painstakingly created, in close cooperation with the Member States, let alone accept any accountability or responsibility for it. In what follows we will demonstrate that all the actions and inactions directly or indirectly linked to the most far-reaching violations of human rights inherent in what the EU terms as "migration management" under the banner of "emergency,"¹⁶³ "crisification"¹⁶⁴ or "addressing the root causes of migration"¹⁶⁵ have been carefully designed within the auspices of the EU's lawlessness law. EU lawlessness law helps to create and manage the EU's lawless border zone through informal agreements, money and diluted-to-zero responsibility in a direct and concerted attack on EU values as expressed in Article 2 TEU¹⁶⁶—the "untouchable core" of today's EU legal order¹⁶⁷—and in particular, the very idea of the Rule of Law and human rights. This law as designed and applied is there to ensure the inapplicability of any core Rule of Law considerations—respect for fundamental principles and values, as well as basic accountability—and to the disrespect of human rights. The lawlessness law is thus a ruthless violation of the EU, but also ECHR and international law. Given how far it breaches the values of Article 2 TEU, which establishes the baseline of values applicable to the EU and the Member States alike, it is also clear that EU lawlessness law violates Member States' law as well: no lawful delegation can have the effect of destroying the Rule of Law, denying human rights and undermining basic accountability—but these are the core elements of the EU's lawlessness law.

¹⁶⁰ *Italian Captain Given Jail Term for Returning Migrants to Libya*, Aljazeera (Oct. 15, 2021) <https://www.aljazeera.com/news/2021/10/15/italian-ship-captain-jail-returning-migrants-libya>. See also, Itamar Mann & Julia Mourão Permosé, *Floating sanctuaries: The ethics of search and rescue at sea*, 10(3) MIGR. STUD. 442 (2022); Itamar Mann, *The Right to Perform Rescue at Sea*, 21 GERMAN L.J. 598 (2020).

¹⁶¹ *Hirsi Jamaa & others v. Italy*, app. no. 27765/09; *Safi & others v. Greece*, app. no. 5418/15.

¹⁶² SHATZ, *supra* note 12.

¹⁶³ Gkliati & Kilpatrick, *supra* note 145.

¹⁶⁴ Violeta Moreno-Lax, *Crisis as (Asylum) Governance*, 9 EUR. PAPERS 179 (2024).

¹⁶⁵ See Natascha Zaun & Olivia Nantermoz, *The Use of Pseudo-causal Narratives in EU Policies* 29(4) J. EUR. PUB. POL'Y. 510 (2022).

¹⁶⁶ Marcus Klamert & Dmitry Kochenov, *Article 2*, in *THE EU TREATIES AND THE CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY* 26 (1st vol. MANUEL KELLERBAUER ET AL., eds., 2nd ed. 2024).

¹⁶⁷ *Id.*

The success of EU lawlessness law—which has made travel to the EU deadly dangerous for countless non-white passport poor—demonstrates that holding legality in high esteem is not enough to ensure that the EU behaves like and be a true constitutional system based on the respect for the Rule of Law.¹⁶⁸ EU lawlessness law implies mobilizing legality against the Rule of Law. There is a design problem in the EU which not only concerns the operation of the EU legal system, but also the EU's constitutional nature.¹⁶⁹ Adherence to the principle of the Rule of Law, which has been sufficiently well articulated in the EU by now,¹⁷⁰ would require what Gianluigi Palombella characterized as “a limitation of law(-production), through law.”¹⁷¹ Such limitation failed to emerge as an important factor in the making and application of EU law.¹⁷² “This reality results from a most problematic approach adopted by the Union: in addition to an inexplicable immodesty (which is not illegal, per se, of course), the Union suffers from a fundamental misrepresentation of the key function of the European system of human rights protection, which is to ensure that no legal system in Europe feels itself autonomous from human rights,”¹⁷³ as one of us argued earlier. The EU's failure is particularly visible in the field of migration and asylum, where the Court reveals “overzealous concern for the technicalities of the legislative instruments before it and sparse to no reference to human rights instruments or values.”¹⁷⁴ This is the crucial way that the Court takes active part in the creation of the EU's lawlessness law and empowers attacks on EU values by other EU institutions.

Indeed, the EU system is based solely on a legality check in the name of the autonomy of its own law¹⁷⁵—whose accuracy is itself not infrequently highly dubious, if not impossible¹⁷⁶—and refuses external scrutiny¹⁷⁷ while churning out injustices¹⁷⁸ (including the violation of the most fundamental human rights, such as the right to life

¹⁶⁸ Kim Lane Scheppele et al., *EU Values Are Law, after All*, 38 Y. EUR. L. 3 (2020).

¹⁶⁹ Dimitry Kochenov, *EU Law without the Rule of Law* 34 Y. EUR. L. 74 (2015).

¹⁷⁰ Laurent Pech, *The Rule of Law as a Constitutional Principle of the European Union*, Jean Monnet Working Paper No. 4/2009, 2009; Laurent Pech, *Rule of Law as a Well-Established and Well-Defined Principle of EU Law*, 14 HAGUE J. RULE L. 107 (2022).

¹⁷¹ Gianluigi Palombella, *The Rule of Law as an institutional ideal*, in RULE OF LAW AND DEMOCRACY (LEONARDO MORLINO & GIANLUIGI PALOMBELLA eds., 2010).

¹⁷² Kochenov, *supra* note 169; Dimitry Kochenov, *Restoring Dialogical Rule of Law in the European Union: Janus in the Mirror*, CAM. Y. EUR. LEG. STUD. 1 (2024, first view).

¹⁷³ Kochenov, *supra* note 169, at 13.

¹⁷⁴ Aysel Eybil Küçüksu, *Adjudicating Asylum as a Technical Matter at the Court of Justice of the European Union*, in THE INFORMALISATION OF THE EU'S EXTERNAL ACTION IN THE FIELD OF MIGRATION AND ASYLUM, 163, 169 (EVA KASSOTI & NARIN IDRIZ eds., 2022).

¹⁷⁵ See Gianluigi Palombella, *Beyond Legality – Before Democracy* in REINFORCING THE RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION, 36 (CARLOS CLOSA & DIMITRY KOCHENOV eds., 2016).

¹⁷⁶ See Petra Bárd, *In Courts We Trust, or Should We?* 27 EUR. L.J. 185 (2002); Dimitry Kochenov & Petra Bárd, *Kirchberg Salami Lost in Bosphorus*, 60 J. COMMON MKT. STUD. 150 (2022).

¹⁷⁷ See Opinion 2/13 (ECHR Accession II), EU:C:2014:2454; cf. Bruno de Witte, Šelja Imamovic, *Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court*, 40 EUR. L.R. 683 (2015); Piet Eeckhout, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue*, 38 FORDHAM INT'L L.J. 955 (2015); Kochenov, *supra* note 169.

¹⁷⁸ See for a broad debate: EUROPE'S JUSTICE DEFICIT? (DIMITRY KOCHENOV ET AL. eds. 2015); FLORIS DE WITTE, JUSTICE IN THE EU (2015).

and the prohibition against torture).¹⁷⁹ Such a system of law is unquestionably at the antipode of the very idea of the Rule of Law, let alone any of the other EU values.

C. Undermining national constitutionalism through the EU's black hole of accountability

The EU legal order tends to leave outstanding fundamental rights issues to other legal orders, either national or in the Council of Europe, despite being directly responsible for situations where human rights and Rule of Law violations are perpetrated in an atmosphere of absolute impunity.¹⁸⁰ At best, this results in a good deal of confusion and denial of responsibility, which could ultimately lead to a situation where there is near complete Rule of Law vacuum.

Worse is possible when the legal black hole purposefully created at the supranational legal level *de facto* helps EU Member States whitewash their breaches of national and ECHR law, by pumping their money, policies and efforts through a bespoke accountability vacuum to escape responsibility for horrible acts.¹⁸¹ This emerges as one of the aims of the EU's lawlessness law: Eurowhiteness meets an ideal black hole of accountability and its brotherly embrace is endowed with the legal respectability offered by lawlessness law. That said, successfully creating this type of legal vacuum obviously violates EU values, including the Rule of Law and the protection of fundamental rights, in their entirety. The creation of bespoke lawlessness is done through appeals to legality and through the complexity of the European continental structures for sharing responsibility for the crimes being perpetrated. The EU thus performs an exaggerated attention to legality in the absence of the Rule of Law as a working normative ideal.¹⁸² In doing so, the EU achieves the priorities of the lawlessness law because it manages to avoid the very idea of rights and the Rule of Law in the process of installing the punishing biopolitics of Eurowhiteness in the full impunity of the absolute legal vacuum created with the help of a purposefully narrow and sterile view of legality in EU law. The ideal of "migration management" in this context aims to ensure a total absence of human rights, Rule of Law and basic accountability to crush down the migration of non-white people from the formerly colonized spaces and beyond: no racialized passport poor should arrive. Crucially for the completeness of the legality-framed lawlessness law edifice, the ECJ actively participates in building this lawless system of absolute violation of rights to the fullest extent possible.

IV. EU LAWLESSNESS LAW THROUGH DEALS OUTSIDE THE LAW

The first EU lawlessness law technique that we identify consists of the EU Institutions moving international agreements with the poorest countries, failed states and transit jurisdictions outside the realm of EU "law" proper by recourse to "soft"

¹⁷⁹ See Lighthouse Reports, *Aegean Pushbacks Lead to Drowning* (Feb. 17, 2022), <https://www.lighthousereports.com/investigation/aegean-pushbacks-lead-to-drowning/>; ECRE, *supra* note 138.

¹⁸⁰ See Dimitry Kochenov, *The EU and the Rule of Law* in EU RULE OF LAW BETWEEN IDEALISM AND REALISM 419 (MAURICE ADAMS ET AL. eds, 2017).

¹⁸¹ Basheska & Kochenov, *supra* note 21.

¹⁸² See Palombella, *supra* note 171.

law.¹⁸³ Such deals disapply any rights that the racialized passport poor which they target may have by purposefully locating them outside the basic tenets of the Rule of Law. In essence we are dealing with (unpublished) law which is mostly unavailable for review in the courts and which purports to set aside all the values, principles, and rights, guaranteed by the EU and the national legal orders and uniquely applies to brown former colonials and other passport poor from the global south. Although the use of informal instruments in the external dimension of EU Migration and Asylum Policy is not new, especially if we look at the practices of the Member States themselves, such instruments have proliferated in recent years as the fight against the migration of the racialized passport poor has been elevated to become the EU's absolute priority,¹⁸⁴ to be achieved through "robust and fair management of external borders," "an effective return policy" and "partnerships with key third countries of origin and transit."¹⁸⁵

Consider non-binding readmission arrangements, some of them unpublished, concluded with impoverished unstable countries subjected to significant EU influence.¹⁸⁶ The broader so-called "cash for migrant control deals"¹⁸⁷ concluded with key third country partners for migration management are not much different. Such "soft" deals shower authoritarian governments and local warlords with European taxpayers' money, in exchange for their retaining racialized migrants at any cost and eliminating any EU accountability for human rights violations by proxy. Supposedly "non-binding," this legal assault on the Rule of Law and human rights ignores rules for the formal adoption of international agreements and is designed as a tool of breaking Human Rights Law and Rule of Law standards.

¹⁸³ See Annick Pijnenburg, *The Informalisation of Migrational Deals and Human Rights of People on the Move*, in *THE INFORMALISATION OF THE EU'S EXTERNAL ACTION IN THE FIELD OF MIGRATION AND ASYLUM* 147, 159 (EVA KASSOTI & NARIN IDRIZ eds., 2022). Cf. Cannizzaro, *supra* note 151 at 256; Juan Santos Vara & Laura Pascual Matellán, *The Informalization of EU Return Policy in THE INFORMALISATION OF THE EU'S EXTERNAL ACTION IN THE FIELD OF MIGRATION AND ASYLUM* 37 (EVA KASSOTI & NARIN IDRIZ eds., 2022).

¹⁸⁴ See Eugenio Cusamano, *Migrant Rescue as Organized Hypocrisy*, 54 *COOPERATION & CONFLICT* 3, 4 (2018); Zaun & Nantermoz, *supra* note 165, at 2; Caterina Molinari, *Digging a Moat around Fortress Europe*, in *MONEY MATTERS IN MIGRATION* (TESSELTJE DE LANGE ET AL. eds., 2021), at 38–39.

¹⁸⁵ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and The Committee of the Regions on a New Pact on Migration and Asylum*, COM (2020) 609 final (Sept. 23, 2020).

¹⁸⁶ With significant influence and change in the domestic legal orders of the third states. See Eleonora Frasca, *The EU's legal influence on migration in the African States: The normative content of development cooperation projects in A GEOPOLITICAL EU IN THE MAKING? THE EU'S ACTORNESS IN A (DE-)GLOBALIZING WORLD* (forthcoming).

¹⁸⁷ ECRE, *EU External Partners: Another EU 'Cash for Migrant Control' Deal Sealed with Egypt*, ECRE WEEKLY BULLETIN (Mar. 22, 2024), <https://ecre.org/eu-external-partners-another-eu-cash-for-migrant-control-deal-sealed-with-egypt-%E2%80%95-civil-society-organisations-call-on-eu-to-review-association-agreement-with-israel-amidst-f/>.

A. Soft law: a lawlessness law technique to disapply the Rule of Law and human rights

Soft law agreements or arrangements consist of “law-like promises or statements that fall short of hard law.”¹⁸⁸ They can be defined as “nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct.”¹⁸⁹ They consist of rules of conduct which usually have no binding force and “may have practical effects”¹⁹⁰ and “legal effects.”¹⁹¹ This definition captures the main doctrinal binary distinction between binding and nonbinding norms¹⁹² and the “intuitive difference between quasi-legal rules and purely political rules,”¹⁹³ although soft law arrangements are extremely diverse.¹⁹⁴ The obligations that soft law agreements impose are weak and shallow, usually involving vague or hortatory terms.¹⁹⁵ Although the reasons for using non-binding and specifically soft law agreements or arrangements are context dependent,¹⁹⁶ one of their main advantages is said to be their flexibility¹⁹⁷ (they are easier to negotiate and to exit and imply a less heavy legal and bureaucratic process).¹⁹⁸ In the context of EU law, soft law agreements are increasingly common in the field of external relations¹⁹⁹ and take different forms.²⁰⁰ They are used as an alternative to the lengthy and contentious process required by the primary law of the Union in this field—Article 218 TFEU—which remains highly political and difficult to harmonize.²⁰¹

Summoning such quasi-law to evade binding requirements and rules proliferated in the field of migration since the so-called migration crisis in 2015–2016:²⁰² although informalization had already become well-established at the national level through

¹⁸⁸ Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEG. ANALYSIS 171, 174 (2010). In the context of EU law, the word “arrangement” is usually preferred when they have a nonbinding nature.

¹⁸⁹ *Id.*

¹⁹⁰ Francis Snyder, *The Effectiveness of European Community Law* 56 MODERN L.REV. 19, 64 (1993)

¹⁹¹ Oana Ștefan, *Soft Law and the Enforcement of EU Law* in THE ENFORCEMENT OF EU LAW AND VALUES 200 (ANDRÁS JAKAB & DIMITRY KOCHENOV eds., 2017).

¹⁹² *But see*, Ramses A. Wessel, *Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?*, 20 EUR. FOREIGN AFFAIRS REV. 123 (2015); Sabine Saurugger & Fabien Terpan, *Studying Resistance to EU Norms in Foreign and Security Policy*, 20 EUR. F. AFF. REV. 1, 5 (2015).

¹⁹³ Non-binding agreements are not necessarily soft law: Curtis A. Bradley et al., *The Rise of Nonbinding International Agreements*, 90(5) U. CHI. L.REV. 1281, 1292 (2023)). In the context of this article, all the non-binding agreements we will mention are considered to be soft law.

¹⁹⁴ Andrea Ott, *Informalization of EU Bilateral Instruments*, 39 Y. EUR. L. 569, 571 (2020).

¹⁹⁵ Bradley et al., *supra* note 193, at 1292.

¹⁹⁶ *Id.*; Guzman & Meyer, *supra* note 188, at 175.

¹⁹⁷ Bradley et al., *supra* note 193, at 1309.

¹⁹⁸ *Id.*, at 1310.

¹⁹⁹ *See* Wessel, *Normative Transformations in EU External Relations*, 44 W. EUR. POL. 72, 86 (2021).

²⁰⁰ *See* Nikolas Feith Tan & Jens Vedsted-Hansen, *Inventory and Typology of EU Arrangements with Third Countries* (CEPS 2021). Paul James Cardwell & Rachel Dickson speak of the ‘formal informality’ in this context: Paul James Cardwell & Rachel Dickson, ‘Formal Informality’ in *EU External Migration Governance*, 49(12) J. OF ETHNIC & MIG. STUD. 3121, 3122 (2023).

²⁰¹ Paul James Cardwell, *New Modes of Governance in the External Dimension of EU Migration Policy*, 51(6) INT’L MIG. 54, 54–55 (2013).

²⁰² Paula García Andrade, *EU External Competences in the Field of Migration*, 55 COMMON MKT. L. REV. 157, 192 *et seq.* (2018); Tineke Strik & Ruben Robbesom, *Compliance or Complicity?*, 71 NETHERLANDS INT’L L. REV. 199, 202 (2024).

bilateral non-binding readmission agreements,²⁰³ it slowly started being uploaded to the EU level after the adoption of the Council Global Approach to Migration (GAM) in 2005,²⁰⁴ renewed, revised and renamed GAMM in 2011 (Global Approach to Migration and Mobility),²⁰⁵ and again in June 2016 through the Migration Partnership Framework (MPF) with a much stronger emphasis on informality,²⁰⁶ following the Valletta Summit dealing with the “migration crisis.” The framework mobilizes considerable resources to deploy positive and negative conditionality—the so-called “more-for-more” approach²⁰⁷—creating new incentives in new fields with priority for certain key source and transit countries,²⁰⁸ to make the movement and migration of the racialized passport poor as difficult as possible already while they are thousands of miles from European shores. This was identified by Thomas Gammeltoft-Hansen and James Hathaway as *non-entrée* practices.²⁰⁹

Several informal partnerships—“Migration Compacts”—were concluded within the auspices of the 2016 MPF.²¹⁰ Most are marked by a virtually total lack of transparency and are characterized by secrecy regarding the incentives offered by the

²⁰³ See Jean-Pierre Cassarino, *Informalizing EU Readmission Policy*, in THE ROUTLEDGE HANDBOOK OF JUSTICE AND HOME AFFAIRS RESEARCH, 83, 91 (ADRIANA RIPOLL SERVENT & FLORIAN TRAUNER eds., 2018).

²⁰⁴ European Council, *Global approach to migration: Priority actions focusing on Africa and the Mediterranean*, Doc. 15744/05, 13 December 2005.

²⁰⁵ *Communication from the Commission on the Global Approach to Migration and Mobility*, COM(2011) 743 final (Nov. 18, 2011). See also: Peter Seeberg, *Mobility Partnerships and Security Subcomplexes in the Mediterranean*, 22 EUR. F. AFF. REV. 91 (2017).

²⁰⁶ *Communication from the Commission on establishing a new Partnership Framework with third countries under the European Agenda on Migration* COM(2016) 385 final (Jun. 7, 2016). See also Cassarino, *supra* note 203, at 88. Clare Castillejo, *The EU Migration Partnership Framework* (German Institute of Development and Sustainability (IDOS), Working Paper No. 28, 2017).

²⁰⁷ *European Agenda on Migration*, *supra* note 206.

²⁰⁸ It implies an element of conditionality: *Communication from the Commission on the Global Approach to Migration and Mobility*, COM (2011) 743 final (Nov. 18, 2011). It is about (material) ‘incentives,’ rather than ‘coercive conditionalities’: Cassarino, *supra* note 203, at 88.

²⁰⁹ Thomas Gammeltoft-Hansen & James C. Hathaway, *Non-Refoulement in a World of Cooperative Deterrence* (Law & Economics Working Papers 106, 2014), https://repository.law.umich.edu/law_econ_current/106.

²¹⁰ *European Parliament resolution of 19 May 2021 on human rights protection and the EU external migration policy*, (2020/2116(INI)), ¶ I.

Including with:

- Ghana: *Joint Declaration on Ghana-EU Cooperation on Migration of April 2016*, https://www.eeas.europa.eu/node/5249_en.

- Nigeria: *Common Agenda on Migration and Mobility signed on 12 March 2015 as well as Joint communiqué of 18 November 2020*, https://www.eeas.europa.eu/eeas/seventh-nigeria-eu-ministerial-dialogue-joint-communiqué%20C3%A9_en.

- Niger: *Joint Migration Declaration of June 2016*. However, the text remains secret and has remained unpublished (see Sergio Carrera, *On Policy Ghosts*, in EU EXTERNAL MIGRATION POLICIES IN AN ERA OF GLOBAL MOBILITIES 21, 40 (SERGIO CARRERA ET AL. eds., 2019)).

- India: *Joint declaration on a Common Agenda on Migration and Mobility Signed between the European Commission and the Government in 2016*, <https://www.icmpd.org/file/download/47921/file/Joint%2520Declaration%2520EU-India%2520CMM.pdf> See also: *EU-India joint Press statement of 20 October 2023*, https://www.icmpd.org/file/download/60274/file/Joint%2520Press%2520Statement_7th_India_EU_HLDMM.pdf.

- Turkey: The so-called EU-Turkey deal counts among the broader readmission arrangements (see Part IV(d)).

EU.²¹¹ These compacts are now considered as the second generation of mobility partnerships and constitute “a political framework for continued and operational cooperation,”²¹² “backed up by direct political pressure in the form of a higher involvement of Member States diplomacy, funds and incentives for cooperation”²¹³ and an emphasis on a “tailored engagements” as well as “flexible and rapid financial support.”²¹⁴

Some strictly concern readmission, others—the multi-purpose partnerships, or “compacts”—are broader and encompass the purported objectives of tackling the root causes of irregular migration as well as preventing and fighting such migration, smuggling and trafficking of human beings. Their disastrous effects on human rights have by now proven capable of reshaping the very core of the EU’s constitutional system into that of EU lawlessness law. In fact, they are slowly becoming the norm following the EU Migration Pact which completely normalizes their already rampant use.²¹⁵ This is despite harsh criticism regarding these deals and their outright illegality in substance but also in terms of procedure, to say nothing about the goals such agreements appear to intend, including refoulement, human rights abuses and deviations from procedural imperatives, all repugnant to EU law.²¹⁶ The new “cash for migrant control deals” concluded in 2023–2024 with Tunisia,²¹⁷ Mauritania,²¹⁸ and Egypt²¹⁹ lack any references to guarantees of respect for the fundamental rights of the deportees.²²⁰ It is not a surprise, that in 2021 the European Parliament took a position against this informalization trend regarding readmission arrangements, but also the “cash for migrant control deals” more broadly.²²¹ To no avail: the Parliament remains completely sidelined. In fact, the failure to “consult the European Parliament also contradicts the principle institutional balance enshrined in the EU Treaties, since its power of political control and consultation recognized in Article 14 TEU requires [...]”

²¹¹ Cardwell & Dickson, *supra* note 200, at 3121.

²¹² *Communication from the Commission on the First Progress Report on the Partnership Framework with third countries under the European Agenda on Migration*, Brussels, COM (2016) 700 final (Oct. 18, 2016).

²¹³ Eleonora Frasca, *More or Less (Soft) Law?*, 1 QUEEN MARY L.J. 1 (2021).

²¹⁴ *European Agenda on Migration*, *supra* note 206.

²¹⁵ European Commission, *supra* note 185.

²¹⁶ Paula García Andrade, *EU Cooperation on Migration with Partner Countries within the New Pact*, EU MIGR. L. BLOG (Dec. 8, 2020), <https://eumigrationlawblog.eu/eu-cooperation-on-migration-with-partner-countries-within-the-new-pact-new-instruments-for-a-new-paradigm/>.

²¹⁷ See Part IV(e).

²¹⁸ Joint Declaration Establishing a Migration Partnership Between the Islamic Republic of Mauritania and the European Union (Mar. 8, 2024), https://home-affairs.ec.europa.eu/eu-mauritania-joint-declaration_en. *The European Commission launches new migration partnership with Mauritania*, Press release (Mar. 7, 2024) https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1335. Hassan Ould Moctar described it as destined to fail: *The EU-Mauritania migration deal is destined to fail*, Aljazeera (Mar. 26, 2024), <https://www.aljazeera.com/opinions/2024/3/26/the-eu-mauritania-migration-deal-is-destined-to/>.

²¹⁹ *Joint Declaration on the Strategic and Comprehensive Partnership between The Arab Republic of Egypt and the European Union*, News Article (Mar. 17, 2024), https://neighbourhood-enlargement.ec.europa.eu/news/joint-declaration-strategic-and-comprehensive-partnership-between-arab-republic-egypt-and-european-2024-03-17_en; ECRE, *supra* note 187.

²²⁰ Strik & Robbesom, *supra* note 202, at 213.

²²¹ *European Parliament resolution of 19 May 2021 on human rights protection and the EU external migration policy*, (2020/2116(INI)).

its intervention in the procedure of adoption of international soft agreements.”²²² Indeed, the duty of information is fully part of the democratic control whether or not it is explicitly mentioned every time.²²³ In areas where the Parliament enjoys a co-legislator role, such as in the Area of Freedom Security and Justice, Violeta Moreno-Lax suggests that such soft-law arrangements could require the consultation or even the consent of the European Parliament according to the spirit of Article 218(6) TFEU, and along the same lines as Article 218(10) (on which the Court has already ruled), since both provisions reflect the importance of the principle of institutional balance.²²⁴ Indeed, avoiding the procedural guarantees in this way would “mean that the applicability of constitutional safeguards depends entirely on choices regarding the design instead of content made by Commission or Council,” which is quite problematic.²²⁵

Impact assessments of the EU’s readmission policies are not available, again in a troubling departure from correct EU procedure.²²⁶ The jurisdiction of the ECJ is also very limited in this area.²²⁷ Worse still, many of such agreements are not even available on the website of the Council, or published in the *Official Journal*, raising serious questions of basic transparency, democratic control²²⁸ and the Rule of Law, offering alarming twenty-first century examples of secret rules disabling human rights.

B. Bypassing the procedural guarantees of the primary law

Generally, informal EU agreements or arrangements with third countries are not channeled through Article 218 TFEU the “procedural code governing the negotiation and conclusion of international agreements” in the words of Sir Alan Dashwood.²²⁹ This provision implies a series of procedural requirements and guarantees, but only applies to formally legally binding agreements concluded by the EU. Scholars have argued that in some instances, binding international agreements have been concluded and disguised as soft law instruments, which is a blatant violation of Article 218 TFEU.²³⁰ Graham Butler is correct when he explains that the mere avoidance of the

²²² García Andrade, *infra* note 236. See Paula García Andrade, *The Role of the European Parliament in the Adoption of Non-Legally Binding Agreements with Third Countries*, in *THE DEMOCRATISATION OF EU INTERNATIONAL RELATIONS THROUGH EU LAW* (JUAN SANTOS VARA & SOLEDAD RODRÍGUEZ SÁNCHEZ-TABERNERO eds., 2018).

²²³ *Parliament v. Council*, Case C-263/14, EU:C:2016:435, ¶¶ 70–71.

²²⁴ See, TFEU art. 218(6) and, by analogy, *Parliament v. Council*, EU:C:2016:435 and C-658/11, *Parliament v. Council*, EU:C:2014:2025. See Violeta Moreno-Lax, *EU Constitutional Dismantling through Strategic Informalization*, 30 *EUR L.J.* 1, 29 (2024).

²²⁵ Maarten den Heijer & Thomas Spijkerboer, *Is the EU-Turkey refugee and migration deal a treaty?*, *EU LAW ANALYSIS* (2016), <https://eulawanalysis.blog-spot.com/2016/04/is-eu-turkey-refugee-and-migration-deal.html>.

²²⁶ European Parliament resolution on human rights protection and the EU external migration policy (2020/2116(INI)), ¶6.

²²⁷ Strik & Robbesom, *supra* note 202.

²²⁸ Mauro Gatti, *The Right to Transparency in the External Dimension of the EU Migration Policy*, in *THE INFORMALISATION OF THE EU’S EXTERNAL ACTION IN THE FIELD OF MIGRATION AND ASYLUM* 97 (EVA KASSOTI & NARIN IDRIZ eds., 2022).

²²⁹ Alan Dashwood, *EU Acts and Member State Acts in the Negotiation, Conclusion, and Implementation of International Agreements*, in *EU LEGAL ACTS* 189 (MARISE CREMONA & CLAIRE KILPATRICK eds., 2018).

²³⁰ Argued by some scholars to have happened with the EU-Turkey deal analyzed below, *e.g.* García Andrade, *supra* note 202, at 197.

formal conclusion of an international agreement is legally dubious “when it is considered whether such deliberate shirking is in the spirit of European cooperation, and a Union which is based on the rule of law.”²³¹ Along the same lines, we can only agree with Caterina Molinari that “recourse to alternative forms of governance precisely to bypass the law, rather than to improve or complement it, is problematic. It may lead to the conclusion that such a use of soft law is unconstitutional *tout court*.”²³²

Moreover, not carrying out any prior evaluation of the human rights impact of such soft law agreements seems to have emerged as dominant practice in the European Union²³³ as confirmed by the Commission recently in the framework of the Memorandum of Understanding concluded with Tunisia.²³⁴

It goes without saying that using soft law instruments to bypass human rights assessments and the procedural guarantees of Article 218 TFEU cannot be interpreted as a legitimate way to pretend that a green light has been given to violate fundamental EU law principles or values, including human rights.²³⁵ The same concerns the principles of conferral and institutional balance.²³⁶ As a result, the legality of most such soft law instruments is highly questionable.

On the one hand, procedurally, with regard to the principles of conferral and institutional balance, many of these agreements are negotiated and signed by the Commission. Although the Commission has the power of external representation of the EU,²³⁷ the Council remains the policy-making authority competent to elaborate the Union’s external action and ensure its consistency:²³⁸ “it shall therefore authorize the negotiation of a soft agreement and decide as well on its signature.”²³⁹ The Treaty²⁴⁰

²³¹ Graham Butler, *EU Foreign Policy and Other EU External Relations in Times of Crisis, in* IRREGULAR MIGRATION AS A CHALLENGE FOR DEMOCRACY 51, 62 (ELŻBIETA KUŹELEWSKA ET AL. eds., 2018).

²³² Molinari, *supra* note 184.

²³³ E.g. European Ombudsman, *Decision in the joint inquiry into complaints 506-509-674-794-927-1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU-Turkey Agreement* (Jan. 18, 2017), <https://www.ombudsman.europa.eu/en/decision/en/75160>.

²³⁴ ‘A human rights impact assessment (HRIA) is not required for the MoU itself, as the latter is a non-binding instrument’: European Commission, *Reply of the European Commission to the questions from the European Ombudsman – Strategic initiative SI/5/2023/MHZ on how the European Commission intends to guarantee respect for human rights in the context of the EU–Tunisia Memorandum of Understanding*, 3 (Feb. 16, 2024), <https://www.ombudsman.europa.eu/en/doc/correspondence/en/183009>.

²³⁵ European Ombudsman, *Decision in the joint inquiry into complaints 506-509-674-794-927-1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU-Turkey Agreement* (Jan. 18, 2017), <https://www.ombudsman.europa.eu/en/decision/en/75160>.

²³⁶ *France v. Comm’n*, Case C-233/02, EU:C:2004:173, ¶ 40; *Council v. Comm’n (Swiss MoU)*, Case C-660/13, EU:C:2016:616. *See also* *Comm’n v. Council (Australian Greenhouse Gas Emissions)*, Case C-425/13, EU:C:2015:483, ¶¶ 62 & 69. In fact, art. 218 TFEU concretizes the principle of institutional balance: Paula García Andrade, *The Memorandum of Understanding between the EU and Tunisia*, EU MIGRATION LAW BLOG (Jan. 16, 2024), <https://eumigrationlawblog.eu/the-memorandum-of-understanding-between-the-eu-and-tunisia-issues-of-procedure-and-substance-on-the-informalisation-of-migration-cooperation/>.

²³⁷ Consolidated Version of the Treaty on the European Union (hereafter: TEU), Oct. 26, 2012, 2012, O.J. (C-326) 13, art. 17.

²³⁸ García Andrade, *supra* note 236.

²³⁹ *Id.*

²⁴⁰ *See*, art. 17 and 16 (1) & (6) TEU.

as interpreted by the ECJ makes clear that in the absence of such an approval the Commission does not enjoy the power to sign a non-binding agreement resulting from negotiations conducted with a third country,²⁴¹ or, *a fortiori*, to engage in such negotiations in the first place.²⁴² Indeed, as put by Andrea Ott, “for external soft law instruments, the Court requires the Commission to have a specific power to act on behalf of the Union or otherwise seek the Council’s prior approval for its action,”²⁴³ which appears to be missing in many instances. In fact, the Commission’s actions are seemingly also in breach of the interinstitutional arrangement for the conclusions of EU soft law agreements dating back to 2017, which aims to ensure respect of the institutional balance when such agreement are concluded.²⁴⁴

On the other hand, should the foundations of EU law be taken seriously, such agreements however they are agreed and whatever the status of procedural legality of their adoption, can neither encourage nor entail, even indirectly, infringements of fundamental rights,²⁴⁵ nor the values of the Union, which has in fact been the case with a number of the most problematic deals including with Turkey and Tunisia, as we shall see.²⁴⁶ Importantly, however, informalization makes human rights violations difficult to avoid and challenge, when they occur. Several reasons explain this: the lack of transparency resulting from the absence of imperative publication requirements applicable to such soft law, the usual complete absence of information during the negotiations, the lack of political control by the European Parliament,²⁴⁷ and the absence of any *ex-ante* check by the Court to ensure that the agreement in question complies with EU law, including Rule of Law and human rights imperatives.

In fact, the absence of any such guarantees is precisely the reason for choosing such legally dubious instruments in the first place. As we will show, soft law plays an essential role in the system of EU lawlessness law, designed and implemented specifically to depart from the key tenets of EU law. What is more, such deals usually do not comprise independent monitoring mechanisms and suspension clauses to be triggered by human rights violations.²⁴⁸ No independent and accessible complaints mechanisms or measures ensuring access to effective legal remedies to obtain redress

²⁴¹ *Swiss MoU*, EU:C:2016:616, ¶¶38, 39&43.

²⁴² Paula García Andrade, *The Distribution of Powers between EU Institutions for Conducting External Affairs through Non-Binding Instruments*, 1(1) EUR. PAPERS 115 (2016).

²⁴³ See Ott, *supra* note 194, at 588.

²⁴⁴ Council of the European Union, *Follow up to Judgment in Case C-660/13 – Arrangements between Secretaries General on non-binding instrument*, 15367/17 (Dec. 4, 2017), <https://data.consilium.europa.eu/doc/document/ST-15367-2017-INIT/en/pdf>. See also European Commission v. Council of the European Union, Case C-377/12, EU:C:2014:1903, ¶ 34.

²⁴⁵ *Front Polisario v. Council*, Case T-512/12, EU:T:2015:953: the Council must ensure that the agreement is not conducted to the detriment of the population of the territory concerned, or entails infringements of fundamental rights, including, in particular, the rights to human dignity, to life and to the integrity of the person (¶ 228). Setting aside of this judgment by the ECJ was unrelated to this finding: *Council v. Front Polisario*, Case C-104/16 P, EU:C:2016:973.

²⁴⁶ See, Part IV(d) & (e), respectively.

²⁴⁷ Except when agreements relate exclusively to CFSP matters, they require either the consent of the European Parliament or its consultation (TFEU art. 218(6)); the former has become the rule and the latter the exception. Moreover, art. 218(10) TFEU prescribes that the European Parliament should be informed at all stages of the procedure and failure to do so is likely to lead to the annulment of an eventual Council decision on the conclusion of an agreement: *Parliament v. Council*, EU:C:2014:2025. See Dashwood, *supra* note 229, at 221–226.

²⁴⁸ Strik & Robbesom, *supra* note 202, at 213.

or reparation for victims of such deals are ever available, perfecting their simple lawless design. Not only is it impossible to involve the ECJ preventively, it is also very difficult to dispute such agreements once they are concluded.²⁴⁹ In general, the involvement of the courts in the enforcement process of soft law is limited²⁵⁰ and soft law agreements make it very difficult if not impossible for individuals to enforce and claim their fundamental rights before domestic and European courts,²⁵¹ not mentioning the potential detrimental length of any such a judicial procedure. In a Resolution dating back to 2021, the European Parliament already noted “with great concern the absence of operational, reporting, monitoring, evaluation and accountability mechanisms for individual cases which track and respond to potential violations, as well as the lack of effective judicial remedies for persons whose rights are allegedly violated as a consequence of informal EU agreements and financial cooperation.”²⁵²

C. Shielding Member States’ inhumane return practices through “non-binding” readmission arrangements

The soft readmission “arrangements”²⁵³ are paradigmatic when it comes to the creation and reinforcement of EU lawlessness law through soft law deals. They are quite peculiar because EU Member States supported by FRONTEX actually implement them as “normal” law, albeit free from access to judicial review and respect for human rights and values. The informality of these deals constitutes a shield for Member States sending migrants back to the most violent dictatorships in the world—something that should be impossible under the proper application of EU, national and ECHR law, without the lawlessness upgrade, that is.

Until recently, EU readmission agreements have been concluded under the formal rules governing the conclusion of international agreements.²⁵⁴ Demonstrating efficient readmission mechanisms has been elevated to a condition for unlocking any of the advantages offered by the European Union to its poorer partners; ranging from Schengen visa facilitation²⁵⁵ to budgetary transfers for development cooperation. Readmission and returns—i.e. expulsion of irregular migrants—are a clear priority of

²⁴⁹ Wessel is right that the *ex post* judicial review is far more difficult in the case of informal arrangements: Wessel, *supra* note 199, at 85. The ECJ has already deemed itself competent to rule on soft law agreements in other areas in cases brought by privileged applicants: *e.g. Swiss MoU*, EU:C:2016:616. The position of the individual is much more difficult: Ott, *supra* note 194, at 580.

²⁵⁰ Ștefan, *supra* note 191, at 203.

²⁵¹ García Andrade, *supra* note 202, at 192 *et seq.*; Wessel, *supra* note 199, at 85.

²⁵² European Parliament resolution of 19 May 2021 on human rights protection and the EU external migration policy (2020/2116(INI)) ¶ 6.

²⁵³ “Readmission agreements” refers to binding agreements; “readmission arrangements” refers to non-binding ones.

²⁵⁴ See TFEU art. 218 for the procedure concerning the negotiation and conclusion of formal international agreement, which includes guarantees. The full list of countries with which the EU has concluded readmission agreements is available at <https://eur-lex.europa.eu/EN/legal-content/summary/readmission-agreements-between-the-eu-and-certain-non-eu-countries.html/>.

²⁵⁵ Salvatore Fabio Nicolosi, *Refashioning the EU Visa Policy*, 22 EUR. J. MIGR. & L. 467, 490 (2020). See also: European Commission, *Mobility partnerships, visa facilitation and readmission agreements*, https://home-affairs.ec.europa.eu/policies/international-affairs/collaboration-countries/eastern-partnership/mobility-partnerships-visa-facilitation-and-readmission-agreements_en.

the EU's external migration policy,²⁵⁶ especially since the adoption of the EU Return Directive in 2008.²⁵⁷ A lot of pressure and numerous incentives have been put on the table by the EU to coerce third countries to take back migrants.

Since the Treaty of Lisbon, the conclusion of readmission agreements constitutes a shared competence.²⁵⁸ While dozens of readmission agreements have been concluded by Member States for years,²⁵⁹ the EU itself has concluded eighteen official readmission agreements. These include the readmission of third-country nationals to the country of origin and of transit ("provenance"). Because EU readmission agreements are deeply asymmetrical in nature in that they tend mainly to take into account the Eurowhiteness interests of the EU and its Member States in offloading onto other nations any racialized passport-poor trying to get to the Union, they have proven very difficult to conclude, especially with African and Middle Eastern countries. These states "do not blindly sign up for receiving the return of their nationals without something in return. Instead, tangible returns are provided *quid-pro-quo*, as they engage in an 'arm-wrestling match' with the EU negotiators."²⁶⁰ The European Union understood the difficulty and as early as 2005, it planted the seeds of the so-called Mobility Partnership framework. Acting through non-binding joint declarations the goal of the Mobility Partnership framework was to give strong incentives and to apply soft conditionality—the so-called "more for more approach"—to third countries aiming to conclude binding readmission agreements, among other things. Such incentives or positive conditionality measures take the form of visa facilitation schemes and regular channels for temporary migration as well as funds.²⁶¹ Several of the official readmission agreements have been concluded in this framework.²⁶² However the negotiations for the conclusion of such agreements failed with a few key countries, including Morocco, Tunisia, Jordan and Lebanon despite the existence of soft mobility agreements, precisely because of the gravely unbalanced

²⁵⁶ *Communication from the Commission: EU Action Plan on return*, COM (2015) 453 final (Sept. 9, 2015); *Communication from the Commission: A more effective return policy in the EU – A renewed Action Plan*, COM (2017) 200 final (Mar. 2, 2017); *Communication from the Commission: Enhancing cooperation on return and readmission as part of a fair, effective and comprehensive EU migration policy* COM (2021) 56 final (Feb. 10, 2021); *European Commission, Policy Document, Towards an operational strategy for more effective returns* COM (2023) 45 final (Jan. 24, 2023); *European Commission, EU Action Plan for Eastern Mediterranean migration* (Oct. 18, 2023). See also: Statewatch, *Working Party on Integration, Migration and Expulsion*, <https://www.statewatch.org/outsourcing-borders-monitoring-eu-externalisation-policy/document-archive-council-working-parties/working-party-on-integration-migration-and-expulsion/#imex20240607>.

²⁵⁷ Ela Gökalp Aras, *The European Union's Externalisation Policy in the Field of Migration and Asylum* (Swedish Research Institute in Istanbul WP 2021/76, Mar. 24, 2021).

²⁵⁸ TFEU art. 79(3). The system of bilateral agreements was developed earlier: Cassarino, *supra* note 203, at 89.

²⁵⁹ For a comprehensive report, see European Migration Network (EMN), *Bilateral Readmission Agreements* (Sept. 2022), https://home-affairs.ec.europa.eu/system/files/2022-10/EMN_INFORM_bilateral_readmission.pdf.

²⁶⁰ Butler, *supra* note 231, at 62.

²⁶¹ See Peter Seeberg & Federica Zardo, *From mobility partnerships to migration compacts security implications of EU-Jordan relations and the informalization of migration governance*, 48(6) J. OF ETHNIC & MIGR. STUD. 1345 (2022).

²⁶² The following readmission agreements were accompanied by a Mobility Partnership: https://home-affairs.ec.europa.eu/policies/international-affairs/collaboration-countries/eastern-partnership/mobility-partnerships-visa-facilitation-and-readmission-agreements_en.

reciprocities demanded²⁶³ and the strong government commitment implied by such agreements.²⁶⁴

The Commission saw to it that informalization gained a more prominent role in the MPF of 2016, mentioned in the previous section.²⁶⁵ Considering readmission and returns as the weak links of the whole migration regulation framework, it proposed developing “alternative practical arrangements separate from negotiated agreements leading to equivalent results in terms of cooperation on actual returns.”²⁶⁶ A steady informalization trend has been observable since then through the conclusion of informal compacts with the informality pushed to its paroxysm.²⁶⁷ In fact, it effectively replaces the law in relations with countries including Afghanistan (Joint Way Forward),²⁶⁸ Guinea (Good Practices),²⁶⁹ Bangladesh (Standard Operating Procedures),²⁷⁰ Ethiopia (Admission Procedure),²⁷¹ the Gambia (Good Practices),²⁷² Ivory Coast (Good Practices)²⁷³ and Mali (Standard Operating Procedures).²⁷⁴

Having stepped out of the legal framework, the Commission praised these informal arrangements “as an alternative conducive to swift results for third countries with which there was an urgent need to improve cooperation”.²⁷⁵ “negotiations of arrangements are more straightforward than those of readmission agreements, due to their non-binding nature, greater flexibility to incorporate political commitments (e.g. on reintegration), absence of the provisions on the obligation to readmit third country nationals, the acceptance of the EU travel document, tailor made approach, less cumbersome approval procedures in the third country, possibility to keep the

²⁶³ Jean-Pierre Cassarino, *Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area*. (Washington: Middle East Institute 2010), <https://cadmus.eui.eu/handle/1814/14454>.

²⁶⁴ See Seeberg, *supra* note 205, at 99.

²⁶⁵ *European Agenda on Migration*, *supra* note 206.

²⁶⁶ *Communication from the Commission on the fifth Progress Report on the Partnership Framework with third countries under the European Agenda on Migration*, COM (2017) 471 final (Sept. 6, 2017).

²⁶⁷ For a genealogy of the mechanism of readmission agreements and the slow informalization since 2015, see, Moreno-Lax, *supra* note 224, at 4–9; Carrera, *supra* note 210, at 31.

²⁶⁸ *EU-Afghanistan, Joint Way Forward* (2016), https://www.eeas.europa.eu/sites/default/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf. The deal was renewed in 2021: *Joint Declaration on Migration cooperation between Afghanistan and the EU* (2021), https://www.eeas.europa.eu/sites/default/files/jmcd_-_english_version_signed_26apr2021.pdf.

²⁶⁹ *Good Practices* (in force since July 2017). The text is not publicly available.

²⁷⁰ European Commission, *EU-Bangladesh, Standard Operating Procedures* (2017).

²⁷¹ *Admission procedure for the return of Ethiopians from European Union Member States* concluded in 2018. The document is not published but was leaked by Statewatch: <https://www.statewatch.org/media/documents/news/2018/jan/eu-council-regugees-return-ethiopians-15762-17.pdf>.

²⁷² *Good Practices on Identification and Return* (2018) (The text of this arrangement is not available).

²⁷³ *Good Practices* (2018) (The text of this arrangement is not available).

²⁷⁴ *Standard Operating Procedures between the EU and the Republic of Mali for the Identification and Return of Persons without an Authorisation to Stay* (Dec. 6, 2011). See the text leaked by Statewatch: <https://www.statewatch.org/media/documents/news/2016/dec/eu-council-standard-operating-procedures-mali-return-15050-16.pdf>. A broader arrangement regarding migration management was concluded a few days later: *EU-Mali Joint Communiqué of 11 December 2016* (unpublished but leaked by Statewatch; <https://ecre.org/eu-signs-deal-with-mali-as-part-of-partnership-framework/> and <https://www.statewatch.org/media/documents/news/2016/dec/eu-com-mali-communication-11-12-16.pdf>).

²⁷⁵ European Commission, *Non-Paper on a Strategic Approach on Readmission Agreements and Arrangements*, 8429/22, at 4 (Apr. 29, 2022) (<https://www.statewatch.org/media/3680/eu-com-readmission-strategic-approach-non-paper-8429-22.pdf>).

arrangement confidential.”²⁷⁶ The Commission is clear about the nature of the informal arrangements in question and the results they are expected to achieve in the form of ensuring swift readmission and returns.²⁷⁷

Yet, readmission and returns can also be part of soft multi-purpose deals which include other migration containment aspects such as the development of the operational capacities of border control and management, and the fight against human trafficking.²⁷⁸ Although encompassing readmission and returns cooperation engagements, they are much broader than the other informal readmission arrangements, which mainly concern returns. According to the European Parliament, in 2021 the EU concluded more than eleven informal readmission arrangements (including the broader ones).²⁷⁹ This number should be at least fourteen today since the conclusion of “cash for migrant control deals” with Egypt, Tunisia and Mauritania in 2023–2024.²⁸⁰ The EU is now pushing for more such informal readmission arrangements with other third countries, including Iraq.²⁸¹

Although the Commission implies that informal deals make negotiations with third countries easier and are more efficient in terms of results (i.e. sending larger numbers of racialized passport poor away from the former colonial centers), both points have been convincingly disproven.²⁸² The EU itself has recently acknowledged (albeit indirectly) the inefficiency of its own lawlessness law on returns. In 2021 and 2022, the Council adopted or threatened to adopt “negative” conditionality measures,²⁸³ including restrictive measures on short-stay Schengen visas, in order to punish the non-collaborative “partners” including Gambia, Bangladesh and Ethiopia.²⁸⁴ Most ironically, similar punishments awaited also non-partners in the lawlessness law, such as Iraq and Senegal.²⁸⁵ Recently, the Commission even noted that in comparison to binding readmission agreements, “partner countries with

²⁷⁶ *Id.*

²⁷⁷ European Commission, *A humane and effective return and readmission policy*, https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/humane-and-effective-return-and-readmission-policy_en. (Mali is an exception, as it is not listed). See also European Court of Auditors, *EU readmission cooperation with third countries: relevant actions yielded limited results* (Special Report no 17, 2021) at 13 https://www.eca.europa.eu/Lists/ECADocuments/SR21_17/SR_Readmission-cooperation_EN.pdf.

²⁷⁸ See the list of arrangements *supra* note 210.

²⁷⁹ European Parliament resolution of 19 May 2021 on human rights protection and the EU external migration policy, 2020/2116(INI), ¶ I.

²⁸⁰ See EU-Mauritania joint declaration of 8 March 2024: https://home-affairs.ec.europa.eu/eu-mauritania-joint-declaration_en.

²⁸¹ Statewatch, *EU seeking informal agreement to boost deportations to Iraq* (Oct. 11 2023), <https://www.statewatch.org/news/2023/october/eu-seeking-informal-agreement-to-boost-deportations-to-iraq/>.

²⁸² *Id.*

²⁸³ Presidency of the Council of the EU, 13996/23 (Oct. 17, 2023). Cf. Eleonora Frasca & Emanuela Roman, *The Informalisation of EU Readmission Policy*, 8(2) EUR. PAPERS 931, 950 (2023).

²⁸⁴ Statewatch, *EU readmission cooperation with partner countries – state of play* (Jan. 28, 2022), <https://www.statewatch.org/media/3155/eu-com-readmission-cooperation-overview-letter-to-libe-28-1-22.pdf>. See also: European Court of Auditors, *supra* note 277, at 13.

²⁸⁵ For an overview of the implementation of these arrangements, see: Statewatch, *EU: Deportations: overview of readmission cooperation in key countries* (Mar. 9, 2022), <https://www.statewatch.org/news/2022/march/eu-deportations-overview-of-readmission-cooperation-in-key-countries/>; Statewatch, *EU readmission cooperation*, *supra* note 284. See also: European Court of Auditors, *supra* note 277.

readmission arrangements had much lower average rates of effective return during the same period.”²⁸⁶ And here is the paradox: the lawlessness route offered by the Commission as more effective and eventually leading to the “real” readmission agreements is in fact neither: it appears that soft law readmission arrangements actually undermine the feasibility of reaching formal readmission agreements, as they remove the incentive for third countries to make formal agreements, as Sergio Carrera concludes.²⁸⁷ Such reality checks do not affect the harsh implementation of the passport apartheid in the EU and the Commission constantly pushes for more informal arrangements even in a context when it is clear that beyond being ineffective in the context of the dubious Eurowhiteness objectives such agreements are an abuse of the law through an artificial carving out of the legal spaces of lawlessness.

Despite their doubtful legal nature and efficiency, the Migration Pact, reflecting the ongoing praxis of containment with an emphasis on return policy, insists on the reinforcement of effective cooperation with third-countries.²⁸⁸ It also confirms the importance of these soft law arrangements as key tools for the cooperation with third countries for the efficient expulsion of migrants, embracing the continuation of EU lawlessness law through soft law readmission arrangements.²⁸⁹ The Pact confirming the conditionality/incentive rationale goes even further stating that “all the relevant policies and tools” should be mobilized to reach return and readmission goals, including for the Commission to “identify further effective measures to incentivize and improve cooperation to facilitate return and readmission, including in other policy areas of interest to the third countries.”²⁹⁰

As it stands, EU soft law offers a well-known loophole to escape the most basic guarantees in terms of the Rule of Law and fundamental rights, especially because “partner countries” are unable to give human rights guarantees, particularly when it comes to “reintegration” of the deportees. Quite astonishingly, the EU does not consider it necessary to be bound by fundamental rights and Rule of Law standards when it comes to concluding agreements for returning undocumented third-country nationals to the signatory country, and paying for this. In fact, these problematic soft arrangements are entangled within a web of lawlessness techniques, which includes funding (many are based on financial incentives), the participation of FRONTEX in returns and the active role of the Commission in orchestrating this lawless framework, as opposed to being bound by the Treaties and respecting the law as explained below.

The problem lies not so much with the informal character or the atypical legal nature of these arrangements. Soft law is today fully part of EU integration, including the common EU framework on migration and asylum. The enforcement of soft law is a regular item on the governance agenda.²⁹¹ The issue is much deeper than a legal

²⁸⁶ European Commission, *supra* note 275; Presidency of the Council of the EU, 13996/23 (Oct. 17, 2023) explaining that ‘Proposing restrictive visa measures in most cases has so far been enough to improve cooperation’ (only in the case of the Gambia a decision to impose visa measures restriction was adopted).

²⁸⁷ Carrera, *supra* note 210, at 45.

²⁸⁸ Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013, 2024 O.J. L, art. 5 and rec. 5 of the Preamble.

²⁸⁹ *Id. See*, European Commission, *supra* note 185, at 20.

²⁹⁰ Regulation (EU) 2024/1351, art. 5.

²⁹¹ Ștefan, *supra* note 191.

qualification or a question of informality and precisely relates to the absence of willingness on the part of the EU to have its own actions and inactions checked against fundamental rights and the Rule of Law at any stage—far beyond respect for the institutional balance²⁹² and transparency,²⁹³ let alone the basic Rule of Law requirements that the law affecting your situation be published.²⁹⁴ The EU willingly designs the legal loopholes, in order to adopt deals to escape any kind of scrutiny, accountability or responsibility. Binding EU readmission agreements themselves already raise human rights concerns,²⁹⁵ and making them informal is just another particularly “worrying” open door to more abuses.²⁹⁶ It also leads to arbitrariness, the main enemy of the Rule of Law.²⁹⁷ Absent the usual safeguards, the EU’s actions are designed to facilitate fundamental rights violations and bring EU lawlessness law into the lives of countless victims of this murky unlawful legal framework, which is uniquely reserved for mistreatment of the racialized passport poor and is not designed to apply to the citizens of “Western” nations.

D. EU-Turkey: disapplying the law by informal agreements outside of its scope

The infamous EU-Turkey Statement²⁹⁸ goes one step further than the secret “non-binding” readmission agreements concluded with the poorest states, which are actually rigorously enforced to set aside all of EU law, including Rule of Law and human rights guarantees. The Turkey deal perfects the departure from the basic idea of the Rule of Law and is remarkable for the leading role played by the Court of Justice in establishing the articulation with the EU lawlessness law involved.²⁹⁹ Agreed in March 2016, the deal established that as of 20 March 2016 all new irregular migrants crossing from Turkey into the Greek islands should be returned to Turkey and that for every Syrian returned to Turkey from the Greek Islands, another Syrian would be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria.³⁰⁰ In exchange the EU promised, *inter alia*, to accelerate visa liberalization for Turkish

²⁹² The Court held that the principle of institutional balance found in TEU art. 13(2) is applicable to the signature of non-binding agreements as regards the relations between the Commission and the Council: *Swiss MoU*, EU:C:2016:616. See also Molinari, *supra* note 184.

²⁹³ Gatti, *supra* note 228.

²⁹⁴ TOM BINGHAM, *THE RULE OF LAW* (2010).

²⁹⁵ Mariagiulia Giuffr  et al., *On ‘Safety’ and EU Externalization of Borders*, 24 EUR. J. MIG. L. 570, 572 (2022).

²⁹⁶ See Wessel, *supra* note 199, at 85; Carrera, *supra* note 210.

²⁹⁷ Martin Krygier, *Tempering Power*, in BRIDGING IDEALISM AND REALISM IN CONSTITUTIONALISM AND RULE OF LAW 34 (MAURICE ADAMS, ET AL. eds., 2016).

²⁹⁸ *Statement of the EU Heads of State or Government*, (Mar. 8, 2016), <https://www.consilium.europa.eu/en/press/press-releases/2016/03/08/eu-turkey-meeting-statement/>; European Council, *EU-Turkey statement* (Mar. 18, 2016), <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>.

²⁹⁹ K   ksu, *supra* note 174, at 169 and Gatti, *supra* note 228, at 97 speak of a ‘passive’ role of the Court. However, not applying constitutional principles is a proactive stance against the Rule of Law and third country nationals’ rights.

³⁰⁰ E.g. For Turkey, see, Refugees International, *40 NGOs Denounce Greece’s New Law Designating Turkey as a Safe Third Country* (Jun. 14, 2021), <https://www.refugeesinternational.org/reports/2021/6/14/40-ngos-denounce-greeces-new-law-designating-turkey-as-a-safe-third-country>. For Afghanistan, see, UNHRC and IDC, *Vulnerability Screening Tool – Identifying and addressing vulnerability: a tool for asylum and migration systems* (2016), <https://www.unhcr.org/protection/detention/57fe30b14/unhcr-idc-vulnerability-screening-tool-identifying-addressing-vulnerability.html>.

citizens and to re-energize the EU accession process.³⁰¹ It also promised billions of euros. The statement is considered as providing the “overall” and “key” framework for EU-Turkey cooperation on migration³⁰² and was announced on the website of the Council—no other text or document was made available. It was decided at a meeting which took place in accordance with the 2015 EU-Turkey joint action plan³⁰³ which aimed to respond to the crisis situation in Syria and is part of a package of other measures and meetings held between Turkey and the EU since September 2015.³⁰⁴

Turkey has received almost EUR 6 billion from the EU and the Member States since the signature of the infamous EU-Turkey Statement in 2016,³⁰⁵ against a backdrop of constant reports of human rights violations against asylum seekers in Turkey, including systematic forced returns and deportations (mainly of Syrians and Afghans) through “sweeping operations” or “voluntary return declarations” in violation of the non-refoulement principle;³⁰⁶ the systematic detention of certain groups of asylum seekers;³⁰⁷ and the very limited access provided to protection registration resulting in the impossibility to access any kind of services.³⁰⁸ Some of these grave human rights violations are acknowledged by the EU Commission itself,³⁰⁹ which simultaneously does not seem to see any problem in releasing many billions of Euros of European money directly in support of such practices: the containment of any movement of the racialized passport poor is the priority of the EU, trumping all considerations.

Although the number of irregular crossings has decreased since 2015, people are still dying in the Mediterranean, raising deep concerns,³¹⁰ especially in light of the well-known pushback practices by Greece in the presence of FRONTEX and the sub-standard conditions in the hotspots on Greek islands. These were widely considered

³⁰¹ Gamze Ovacık et al., *Taking Stock of the EU-Turkey Statement in 2024*, 26 EUR. J. MIGR. L. 154, 163–164 (2024).

³⁰² *Joint Communication of the European Commission to the European Council, State of play of EU-Türkiye political, economic and trade relations*, JOIN (2023) 50 final (Nov. 29, 2023) at 7.

³⁰³ European Commission, *EU-Turkey joint action plan, Fact Sheet* (Oct. 15, 2015), https://ec.europa.eu/commission/presscorner/detail/de/MEMO_15_5860.

³⁰⁴ Including the first EU–Turkey statement of 29 November 2015 (*Council of the EU, Meeting of heads of state or government with Turkey – EU Turkey statement*, (Nov. 29, 2015)). See, Ott, *supra* note 194, at 596.

³⁰⁵ Council, *Statement of the EU Heads of State or Government, 07/03/2016* (Mar. 8, 2016), <https://www.consilium.europa.eu/en/press/press-releases/2016/03/08/eu-turkey-meeting-statement/>; European Council, *EU-Turkey statement* (Mar. 18, 2016), <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>.

³⁰⁶ Asylum Information Database (AIDA), 2022 Update AIDA Country Report: Türkiye, 16 (Jul. 14, 2023) at 15 and 32 and seq., https://asylumineurope.org/wp-content/uploads/2023/07/AIDA-TR_2022-Update.pdf

³⁰⁷ See Gökalp Aras, *supra* note 257 at 103 and seq. See also: Ilse Van Liempt et al., ‘Evidence-Based Assessment of Migration Deals the Case of the EU-Turkey Statement’, *20171221-Final Report-WOTRO* (2017), <https://migratiedeals.sites.uu.nl/wp-content/uploads/sites/273/2017/12/20171221-Final-Report-WOTRO.pdf>.

³⁰⁸ Asylum Information Database (AIDA), *supra*, note 306, at 15.

³⁰⁹ ‘Recurrent allegations of human rights violations in the field of migration, particularly in removal centres, remain a concern’: *Commission Staff Working Document*, *supra* note 302, at 20; ‘the situation of refugees in Türkiye continues to deteriorate, aggravated by the economic downturn and the earthquakes’: *Joint Communication to the European Council*, *supra* note 302, at 8.

³¹⁰ IOM, *IOM Concerned about Increasing Deaths on Greece-Turkey Border* (Feb. 18, 2022), <https://www.iom.int/news/iom-concerned-about-increasing-deaths-greece-turkey-border>.

unsustainable from a human rights perspective,³¹¹ and constitute an indirect consequence of the Statement.³¹² scholars have established a clear link between the significant increase in pushbacks and violence, being “the de-facto implementation or negative impacts of the existing policies.”³¹³

One might wonder how such human rights violations could occur with the active support of the EU without any accountability and monitoring. EU lawlessness law does the trick: when the deal was challenged before ECJ, the European Council argued that it did not take part in the deal and that the press statement was an “informal” Member States’ statement—not an EU statement.³¹⁴ The Court upheld the argument—also in appeal—despite numerous convincing clues³¹⁵ that the agreement was, in fact, not only clearly an EU deal, but also one which stood as a straightforward example of an international agreement within the scope of the Vienna Convention.³¹⁶ In agreement with Bas Schotel, “the EU is using more law than meets the eye when executing the Statement.”³¹⁷ “It was not us” gambit is one of the most effective ways for the EU to uphold the lawlessness of own law in its own courts to keep its mass human rights violations going. The Court responded to the evil deeds of *Herren der Verträge* as a Ciauxeschean parliament, rubber-stamping the whims of the Politburo: the ABC of the Rule of Law was disappplied right down to its roots. As a result, this deal which was found to have nothing to do with EU law, effectively suspended it. In other words, while the Commission and the Member States support the design of a deceptively legalistic justification for the lawless legal space targeting uniquely the racialized passport poor that such agreements create, the ECJ has played a fundamental role in moving such deals outside the boundaries of any accountability.³¹⁸

The Court thus endorsed the destruction of the (Rule of) Law, introducing a new low in terms of basic standards: when the sovereign does not feel like being bound by the law in an area, the law will be warped by the sovereign to have any desired effect, and that will then become the law—the lawlessness law—outside the realm of judicial scrutiny: Rule of Law through the looking glass. Some scholarship has been unclear in its analysis of what happened, failing to see the EU’s production of lawlessness in its entirety. So according to Aysel Küçüksu, the Court has reduced its role in this area to that of a passive administrator.³¹⁹ Mauro Gatti equally spoke of a passive role for the Court.³²⁰ Such perspectives are untenable in principle: the creation of a lawlessness

³¹¹ See Alexandra Bousiou, *Peripheralisation and externalisation of the EU asylum regime*, 48 J. ETHNIC & MIGR. STUD. 19 (2022).

³¹² See Greek Council for Refugees, *Country Report: Access to the Territory and Push Backs* (Jul. 10, 2024) https://migrant-integration.ec.europa.eu/system/files/2024-07/AIDA-GR_2023-Update.pdf.

³¹³ See Gökalp Aras, *supra* note 257.

³¹⁴ NF v. Eur. Council, Case T-192/16, EU:T:2017:128. The appeals were dismissed ‘as being manifestly inadmissible’: Joined Cases C-208–210/17 P, NF & Others v. Eur. Council, EU:C:2018:705.

³¹⁵ See Cannizzaro, *supra* note 151.

³¹⁶ See Eva Kassoti & Alina Carrozzini, *One Instrument in Search of an Author*, in THE INFORMALISATION OF THE EU’S EXTERNAL ACTION IN THE FIELD OF MIGRATION AND ASYLUM 237 (EVA KASSOTI & NARIN IDRIZ eds., 2022), at 237.

³¹⁷ Schotel, *supra* note 151. See also: den Heijer & Spijkerboer, *supra* note 225; Butler, *supra* note 231, at 72.

Contra Ott, *supra* note 194, at 597.

³¹⁸ See, NF v. Eur. Council, EU:T:2017:128, ¶22; NF & Others v. Eur. Council, EU:C:2018:705.

³¹⁹ Küçüksu, *supra* note 174, at 169.

³²⁰ Gatti, *supra* note 228.

law, which greenlights the setting aside of all key constitutional principles in the acts of a constituted entity, unquestionably expresses a proactive stance against the Rule of Law and fundamental rights, let alone compliance with international obligations. The ECJ has done this on a number of occasions, helping the collective sovereign—the Member States—not to be bound by any law.³²¹ Since the EU is not directly subjected to the ECHR, such a framing of the law by a pocket court unties the hands of national governments unhappy with the implications of the requirements of the Rule of Law, human rights, and basic values at a scale which extends far beyond EU law *sensu stricto*, as it also shields collective crimes perpetrated by “not us” from the jurisdiction of the ECtHR.

The concrete outcome of this shameful jurisprudential innovation, which will haunt the legacy of the Court long after the judges who dismissed EU law have left the bench, is clear: the actual EU law, with all its rights and protections, which *is* subjectable to judicial review, is set aside and violated in *all* cases where the Court indicated that they are falling outside the law. The Court thus acted as a high priest of lawlessness: a failure to temper power in the EU,³²² revealing the structural Rule of Law deficiencies at the core of the supranational legal system.³²³ That disapplying the law can fall completely outside the realm of EU law is astonishing.³²⁴ Even more so, given how many NGOs³²⁵ and scholars³²⁶ have denounced the most blatant violations of fundamental rights in returning migrants to Turkey.

The Court, in accord with other institutions, has created a lawless no-man’s-land and plenty of people have been placed there, without any rights and protections. Anyone can cite the lawlessness law in operation—the relevant Court decision—should any doubts concerning the legality of the destruction of EU law applicable to these third country nationals arise. Bas Schotel is right in saying that this decline of legal authority to escape legal accountability is unsustainable in the long term and “seriously questions the EU’s ability to organize independent and neutral judicial review in its own case,”³²⁷ hinting at a systemic failure of the crucial Rule of Law guarantees.

³²¹ The Court also did the same thing in other fields, including the deployment of EU lawlessness law to whitewash the attacks by the Masters of the Treaties on its own independence: Dimitry Kochenov & Graham Butler, *Independence of the Court of Justice of the European Union*, 27 EUR. L.J. 262, 292 (2021). For a general analysis see also Kochenov & Bárd, *supra* note 176; Kochenov, *Restoring Dialogical Rule of Law*, *supra* note 172.

³²² Krygier, *supra* note 297.

³²³ CEU Democracy Institute Rule of Law Clinic, *Report. Rule of Law beyond the EU Member States: Assessing the Union’s Performance* (Oct. 28, 2024).

³²⁴ Pijnenburg, *supra* note 183.

³²⁵ See, e.g., *Removal and Refoulment*, Asylum Information Database (Aug. 17, 2022), <https://asylumineurope.org/reports/country/turkiye/asylum-procedure/access-procedure-and-registration/removal-and-refoulement/>; Orcun Ulusoy & Hemme Battjes, *Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement* (VU Migration Law Series No. 15, 2017), <https://research.vu.nl/en/publications/situation-of-readmitted-migrants-and-refugees-from-greece-to-turk/>; Human Rights Watch, *Turkey Forcibly Returning Syrians to Danger* (Oct. 24, 2019), <https://www.hrw.org/news/2019/10/24/turkey-syrians-being-deported-danger>.

³²⁶ E.g. Gloria F. Arribas, *The EU-Turkey Agreement*, 1 EUR. PAPERS 1097 (2016); Roman Lehner, *The EU-Turkey-“deal”*, 57 INT’L MIGR. 176 (2018); Gökalp Aras, *supra* note 257.

³²⁷ Schotel, *supra* note 151, at 85.

In *Access Info Europe* the General Court went as far as to exempt the Commission from complying with the basic rules in terms of transparency, concerning access to information requests that are indispensable to challenging EU's behavior.³²⁸ The General Court ruled in favor of the Commission, which refused to give the applicant access to all the documents "containing the legal advice and/or analysis of the legality" of the EU-Turkey Statement and the implementing actions,³²⁹ under the pretext that it was allegedly covered by the exception relating "to the protection of the public interest as regards international relations."³³⁰ The General Court dealt with this case as if no mass injustice or violation of rights by the EU were at stake, thus barring the route for any check. Here too was the lawlessness law in operation, avoiding responsibility and waving aside pleas for the actual application of the law as nothing exceptional. Another famous case comes to mind, where the Council argued that an opinion of its legal service whitewashing inaction against large-scale Rule of Law violations was not available for release because it was "given orally."³³¹

The EU lawlessness law technique of taking the most controversial deals out of EU law led to a situation similar to the EU's pumping funds into the criminal networks in Libya, discussed in Part V(a), where the EU did not conclude any agreement or arrangement with Libya, settling instead on merely supporting "Italy in its implementation of the Memorandum of Understanding signed on 2 February 2017 by the Italian Authorities and Chairman of the Presidential Council al-Serra,"³³² through the European Council competent to "define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice."³³³ As a result, it made it impossible to trigger any human rights accountability under EU law, despite millions of Euros from EU funds being spent on the most atrocious human rights violations in Libya, cementing EU lawlessness law and setting up a well-oiled death machine, which led to the loss of dozens of thousands of non-European lives.³³⁴

The EU Turkey-deal has been considered a model "for 'what works' in EU policy and thus a model of externalization for other target countries."³³⁵ Even if we take the stance that something can be considered as "working" while entailing serious human rights abuses by design as well as the wholesale breach of its own law rubber-stamped by its own Court, it is not certain whether the deal was in fact efficient in achieving the strategy of containment that the EU purported to embrace.³³⁶ Indeed, it is a fact that overall, irregular arrivals to the EU have decreased since 2015.³³⁷ However it is

³²⁸ *Access Info Europe*, Case T-851/16, EU:T:2018:69.

³²⁹ *Id.* ¶6.

³³⁰ *Id.* ¶122.

³³¹ *Pech v. Council*, Case T-252/19, EU:T:2021:203.

³³² *Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route* (Feb. 3, 2017), <https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/>.

³³³ TFEU, art. 68.

³³⁴ SHATZ, *supra* note 12; Ganty & Kochenov, *supra* note 11.

³³⁵ Gökalp Aras, *supra* note 257. See also: *Communication from the Commission, Progress report on the Implementation of the European Agenda on Migration*, Brussels COM(2019) 481 final (Oct. 16, 2019).

³³⁶ The Commission is telling the opposite story in its reports: *Communication from the Commission, Progress report on the Implementation of the European Agenda on Migration*, Brussels COM(2019) 481 final (Oct. 16, 2019).

³³⁷ *Commission Staff Working Document*, *supra* note 302, at 7.

impossible to know what role the statement has played in this because of the many other elements to consider and the other factors at play.³³⁸

This is particularly the case in light of the suspension of readmissions by Turkey in 2020, but the story is richer than that. First, Thomas Spijkerboer demonstrated that “the decline in number of arrivals predates the EU-Turkey Agreement, and that if the agreement had any effect, that in fact is the interruption of this decline.”³³⁹ Secondly, Turkey also has its own national agenda on asylum and migration and it is not sure whether it would not have closed its borders and increase returns anyway even without the deal. As of today, almost 63% of the displaced Syrian population finds itself in Turkey,³⁴⁰ which corresponds to 3,15 million people,³⁴¹ not counting the other asylum seekers who add more than 300,000 to the total.³⁴² In other words, “rather than being a passive policy receiver, Ankara’s policy decisions in this field have been geared towards the rational achievement of strategic aims,”³⁴³ reflecting a process of “absorption with reservations.”³⁴⁴ Thirdly, Greece is systematically pushing back the racialized passport poor arriving in boats from Turkey, which is potentially an important element accounting for or contributing to the decrease.³⁴⁵ The Commission thus credits itself for the effectiveness of the far-reaching breach of the law—the EU-Turkey deal—which has nothing to do with the EU law according to the ECJ, while forgetting to credit Greece for equally lawless criminal behavior in achieving the objectives of human rights abuse and attacks on EU values repugnant to the Treaties.

Lastly—and importantly—neither Turkey, nor the EU have in fact implemented important parts of the EU-Turkey statement. Indeed, as already mentioned, in 2020 Turkey suspended the readmission of third country nationals from Greece for alleged health reasons.³⁴⁶ Turkey also further suspended the application of the 2013 EU-Turkey readmission agreement which entered into force in 2017.³⁴⁷ Readmissions have not been resumed since then. In fact—and as could be expected—the reasons behind this suspension are more political than health related: it is due to the EU’s own failure to comply with what was agreed, beyond gifting billions of euros to Turkey. The visa liberalization for Turkish citizens and other commitments that the EU had taken upon itself in the deal have not yet materialized, while Turkey “has repeatedly requested an accelerated implementation of the 2016 Statement.”³⁴⁸ As of the late

³³⁸ See Ovacik et al., *supra* note 301.

³³⁹ Thomas Spijkerboer, *Fact Check: Did the EU-Turkey Deal Bring Down the Number of Migrants and of Border Deaths?* (2016), <https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/09/fact-check-did-eu>.

³⁴⁰ See UNHCR Operational Data Portal: <https://data.unhcr.org/en/situations/syria>.

³⁴¹ See the data on statista: <https://www.statista.com/statistics/1417107/turkey-number-of-syrian-refugees-by-age-group/>.

³⁴² See, *Commission Staff Working Document*, *supra* note 302.

³⁴³ Gökalp Aras, *supra* note 257.

³⁴⁴ *Id.*, referring to Saima Özçürümez & Nazlı Şenses, *Europeanization and Turkey: Studying Irregular Migration Policy*, 13(2) J. OF BALKAN & NEAR EAST. STUD., 233 (2011).

³⁴⁵ E.g., *Safi v. Greece*, App. no. 5418/15, 7 July 2022.

³⁴⁶ *Joint Communication to the European Council*, *supra* note 302, at 8.

³⁴⁷ *Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorization* (Dec. 16, 2018), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A22014A0507%2801%29>.

³⁴⁸ *Joint Communication to the European Council*, *supra* note 302.

³⁴⁸ *Id.*

2023, 2,140 persons had been readmitted by Turkey under the EU-Turkey Statement under the “One-for-One” scheme while 40,000 Syrian refugees had been resettled from Turkey to the EU.³⁴⁹ All this at a huge cost to the European budget and a dramatic loss off face before its own Court winning the Pyrrhic victory of “it is not us” and “it is not law.”

Any change in the EU approach regarding its relationship towards Turkey in the field of migration appears quite hopeless. The recent joint communication to the European Council regarding the state of play uniquely adopts a containment approach without even mentioning the potential human rights issues at stake and insisting on preventing departures, dismantling the criminal smuggling networks, strengthening border protection, resuming readmissions, and supporting returns and refugees and host communities in Turkey.³⁵⁰ In short, the “more for more” approach enshrined in the EU-Turkey deal simply implies more funds for more human rights violations with no tangible results regarding the arrivals of irregular migrants as there is no tangible proof that the deal has played an important role in the reduction of irregular crossings. What is absolutely certain, however, is that the deal helped articulate innovative techniques of EU lawlessness law and started a trend of chronic abuses of the Rule of Law by the EU institutions with the blessing of the ECJ, which targets uniquely racialized former colonials and the other passport poor of this world and is being replicated elsewhere, creating a general solid system of lawlessness where deals like the EU-Turkey Statement are no longer an exception, but the rule.

The most recent example of this is the Memorandum of Understanding (MoU) on a strategic and global partnership signed between the European Union and Tunisia on 16 July 2023. Both parties are remarkable, with the outcome triggering a fundamental transformation of the law. Tunisia is well-known for its drift towards authoritarianism since 2021.³⁵¹ The underlying motive of the EU-Tunisia deal is straightforward: halting irregular migration through and from Tunisia in exchange for financial support and cooperation in other policy areas. This MoU was concluded in the context of increasing numbers of people departing to Europe from and through Tunisia since 2020.³⁵² The financial aspect of the agreement is marred by a lack of transparency,³⁵³ although part of the money has already been provided by the Commission, which already disbursed the first EUR 127 million in September 2023. EUR 67 million—more than half of the original amount—is earmarked as an operational assistance

³⁴⁹ *Id.*

³⁵⁰ *Id.*, at 16.

³⁵¹ European Commission, *The European Union and Tunisia: political agreement on a comprehensive partnership package*, Statement (Jul. 16, 2023), https://ec.europa.eu/commission/presscorner/detail/en/statement_23_3881.

³⁵² The Economist, *Why are migrants to Europe fleeing from and through Tunisia* (May 3, 2023), <https://www.economist.com/the-economist-explains/2023/05/03/why-are-migrants-to-europe-fleeing-from-and-through-tunisia>. Estela Casajuana & Giorgia Jana Pintus, *Beyond borders, beyond boundaries. A Critical Analysis of EU Financial Support for Border Control in Tunisia and Libya, research commissioned by the Greens/EFA in the European Parliament* 14 (2023), <https://extranet.greens-efa.eu/public/media/file/1/8607>.

³⁵³ European Commission, *L'Union européenne poursuit la mise en œuvre du Mémorandum d'entente avec la Tunisie en déboursant 150 millions d'euros de soutien financier*, News Article (Mar. 4, 2024), https://neighbourhood-enlargement.ec.europa.eu/news/lunion-europeenne-poursuit-la-mise-en-oeuvre-du-memorandum-dentente-avec-la-tunisie-en-deboursant-2024-03-04_en.

package on migration. The primary focus for the allocation of resources for migration remains border management:³⁵⁴ the money will be spent to equip the Tunisian Coast Guard, the known perpetrators of serious human rights violation against migrants, among others.³⁵⁵ Human rights protection and the Rule of Law play no role, as no attention is paid to the catastrophic human rights situation in Tunisia for sub-Saharan migrants³⁵⁶ (and which has worsened since the deal).³⁵⁷ The deal includes no prior assessment of its human rights consequences and no guidelines, safeguards and no monitoring mechanisms to ensure that European money does not support, directly or indirectly, mass crimes and human rights violations—like those happening in Libya.³⁵⁸ Despite doubts and criticism about the conclusion of the deal within the EU, no legal actions against it have been brought to the Court so far and the two-months deadline for an action of annulment has passed. Further, option for a preliminary ruling on validity might be extremely difficult to crystalize because it is not self-executing.³⁵⁹ It is easy to imagine the reasons behind the silence: the ECJ has played a strong proactive part in co-creating EU lawlessness law in the first place, as we have seen with the example of the EU-Turkey deal. Bringing the EU-Tunisia agreement, which is as repugnant in both substance and procedure, before *that* Court could obviously be a discouraging prospect.

The EU legal system, of which EU lawlessness law is an indispensable part showered with money and growing in the prestige associated with the implied Eurowhiteness objective of the integration project, has trouble disentangling the lawlessness puzzle. In fact, in the absence of any internal checks and balances the idea that going rogue on own law is necessary in the fight against the racialized passport poor seems to be gaining traction.

V. FUNDING EU LAWLESSNESS LAW: MASS CRIMES AS “DEVELOPMENT”—WHAT THE MONEY CAN BUY

The paramount example of unaccountable spending triggering mass crimes is the operation of the EUTF for Africa, which emerges as the purse of EU lawlessness law. The EUTF for Africa is responsible for the distribution of significant funds invested into quashing opportunities and derail human lives by making the very idea of the law legally unavailable to the racialized passport poor in *de facto* lawless spaces. The Trust Fund lasted seven years (2015–2021) as an emergency measure, but all its projects and the underlying philosophy have now been normalized and included into the operation of EU law *sensu stricto* via the Neighborhood, Development and

³⁵⁴ Casajuana & Pintus, *supra* note 352.

³⁵⁵ U.N., *Joint Communication from Special Procedures*, AL OTH 98/2023, 17 August 2023, 2 (Aug. 17 2023) <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=28292>.

³⁵⁶ Casajuana & Pintus, *supra* note 352. U.N., *Joint Communication from Special Procedures*, AL OTH 98/2023, 17 August 2023, 2 (Aug. 17 2023) <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=28292>.

³⁵⁷ Refugees International, *Abuse, Corruption, and accountability, Time to Reassess EU & U.S. Migration Cooperation with Tunisia* 5 (Nov. 16, 2023), <https://www.refugeesinternational.org/reports-briefs/abuse-corruption-and-accountability-time-to-reassess-eu-u-s-migration-cooperation-with-tunisia>.

³⁵⁸ U.N. HRC, *Report of the Independent Fact-Finding Mission on Libya* (Mar. 27, 2023), <https://www.ohchr.org/en/hr-bodies/hrc/libya/index>.

³⁵⁹ García Andrade, *supra* note 236.

International Cooperation Instrument (hereafter: NDICI) Regulation.³⁶⁰ Let us consider the financial side of the EU's export of lawlessness in more detail.

EU money emerges as a crucial lever for EU lawlessness law to promote the Eurowhiteness agenda, either indirectly via the Members States, such as Italy, or directly via the soft law deals, analyzed in the previous Part. To carry out the harsh exclusion of the racialized other—either directly or via both willing (such as the failed state structures in Libya) and reluctant proxies (such as Tunisia)—the EU needs to spend its way into establishing, supporting and promoting its lawlessness law. EU money plays the most significant role in establishing and operating the immense shadow migration system the EU created at its borders and beyond to target non-white migrants by applying the upgraded colonial principles dating back to its founding, as explained in Part II.

EU lawlessness law costs billions of Euros. EU money is invested in the legalized annihilation of the EU's and Member States' human rights obligations by outsourcing the management of the external borders for certain categories of racialized non-citizens to lawless spaces created in the former colonies and others of the world's poorest countries—including some of those, with which the EU has concluded “soft” partnerships. Indeed, expenditure is intrinsically linked to informal agreements or arrangements, but there is more: EU funds have also been disbursed to support controversial soft law partnerships concluded by its Member States with failed states, causing particular harm.

Beyond migration and border management-related funds and development and cooperation funds, as well as security and defense funds, “International development cooperation” under Article 208 TFEU remains the main banner for such spending, although the majority of funded projects have little to do with the idea of development, or even directly oppose it. The previous Multiannual Financial Framework (MFF) of 2014–2020³⁶¹ mostly relied on the EUTF for Africa to achieve migration management goals under the false flag of development, allowing that fund to emerge as the purse for the EU's lawlessness law. The EUTF for Africa was transposed into the new MFF of 2020–2027³⁶² under the NDICI Regulation,³⁶³ which contributes more than its predecessor to funding EU lawlessness law, presenting similar fundamental accountability, democratic, human rights, and Rule of Law problems despite not being expressly removed from the official EU budget like the EUTF for Africa was. The core aim of this funding remains the same, however: to exclude the migration of non-white people from the former colonies no matter what, even if it costs dozens of thousands of lives and billions of euros.

³⁶⁰ Regulation (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, amending and repealing Decision No 466/2014/EU and repealing Regulation (EU) 2017/1601 and Council Regulation (EC, Euratom) No 480/2009, 2021 O.J. (L 209) 1 (hereinafter: NDICI Regulation), Recital 51 of the Preamble.

³⁶¹ Council Regulation (EU, Euratom) No 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014–2020, 2013 O.J. (L 347) 884.

³⁶² Council Regulation (EU, Euratom) No 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027, 2020 O.J. (L 433I) 11.

³⁶³ NDICI Regulation.

The official pretexts used by the Institutions to fund lawlessness are as cynical as they are absurd. In a neo-colonial vein, mass crimes against racialized populations resulting from the export of lawlessness are benevolently justified as “development,” which also establishes a legal framework for excluding all accountability. EU “development” funding is the backbone of the draconian deployment of the EU passport apartheid outside of the Union’s borders in Libya, Turkey, Tunisia, Niger and Egypt among others.

Unsurprisingly, the funding picture is very complex indeed: EU funds dedicated to EU’s external migration policy are diverse and intertwined and handled by different Commission Directorates-General. The funding landscape constantly evolves over time, creating a coat of many colors.³⁶⁴ The absence of transparency by design makes tracking the money very difficult:³⁶⁵ information on EU funding for cooperation with third countries regarding migration remains unavailable.³⁶⁶ The European Parliament went to the core of the problem with this funding, implying that the underlying goal seems to be “a lack of sufficient and coherent oversight of the Commission’s activities that would enable Parliament to exert democratic scrutiny over the EU’s external migration policy.”³⁶⁷ Funding EU lawlessness law, however “legal,” is unquestionably an abuse of power by the Commission in the absence of legal and democratic safeguards in the EU constitutional architecture to effectively counter such abuse—especially in a context where the Member States eagerly extract political capital from the lawlessness. “It is not us” remains the core selling point of the mass crimes committed from the billions the EU invested.

A. The “shadow immigration system” funded by the EU: the case of Libya

The EU has been injecting huge sums into Libya’s integrated border management, even if the territory of the failed state is not even controlled by one government at the moment. EU funds come as a support to Italy, which signed a Memorandum of Understanding on Migration with Libya in 2017.³⁶⁸ On the occasion of the Malta declaration, following the Valletta Summit, the EU made clear that “it will step up [...] [its] work with Libya as the main country of departure as well as with its North African and sub-Saharan neighbors.”³⁶⁹ In other words, the EU endorsed the MoU, however legally doubtful,³⁷⁰ leaving observers to wonder to what part of the country

³⁶⁴ *Inter alia*: EU Trust Fund for Africa (EUTF), the European Neighbourhood Instrument (ENI), Asylum, Migration and Integration Fund (AMIF), the humanitarian assistance (ECHO), the Instrument contributing to Stability and Peace (IcSP).

³⁶⁵ Vincenzo Genovese, *Money spent by EU on migration policy becoming ‘complex’ to track – expert*, Euro-News (Jul. 4, 2023) <https://www.euronews.com/my-europe/2023/07/04/money-spent-by-eu-on-migration-policy-becoming-complex-to-track-expert>.

³⁶⁶ European Parliament, *European Parliament resolution of 19 May 2021 on human rights protection and the EU external migration policy* (2020/2116(INI)) ¶¶22–23.

³⁶⁷ *Id.*

³⁶⁸ *Memorandum of Understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel* (Odysseus Network, trans., 2017).

³⁶⁹ Malta Declaration, *supra* note 332, ¶ i.

³⁷⁰ A court in Italy found the 2017 MoU incompatible with human rights: Judgment of the Tribunal of Trapani published on May 23, 2019. https://www.asgi.it/wp-content/uploads/2019/06/2019_tribunale_trapani_vos_thalassa.pdf. See also: Martino Reviglio, *Externalizing Migration Management through Soft Law*, 20(1) GLOBAL JURIST 1 (2019).

the MoU is supposed to be applied given the limited control of the “government” of the Libyan territory.³⁷¹

The MoU was co-sponsored by the EU³⁷² (EUR 59 million by the end of 2022)³⁷³ through the EUTF for Africa to support integrated border and migration management, including “Libyan border management authorities” and the enhancement of their maritime surveillance capacity and search and rescue activities at sea and on land, as well as law enforcement, covering “the refurbishment of facilities such as of the maritime rescue coordination centre, the national coordination centre, SAR [search and rescue] vessels, maintenance activities, vehicles, communication equipment and hygiene kits, as well as capacity building.”³⁷⁴

In the absence of a soft partnership with Libya, the EU has used the one that Italy concluded shielding itself from any of the procedural and substantial issues that this MoU entails. The situation is *de facto* similar to the EU-Turkey deal: the MoU does not fall under EU law and is thus shielded from any EU judicial scrutiny and therefore accountability. In the meantime, the EU has injected almost a billion euros into Libya, and has mobilized some operational resources including FRONTEX, the EU Border Assistance Mission to Libya (EUBAM, which has been instrumental in assisting the “Libyan authorities” in border management)³⁷⁵ and the Operation Sofia which has trained the so-called “Libyan Coast Guard,” recruited to make sure that crossing the Mediterranean is deadly dangerous if you are not white.³⁷⁶

The Italy-Libya MoU was tacitly renewed in 2020³⁷⁷ and according to *Médecins sans Frontières*, “is part of a broader defensive strategy being pursued by European governments, based on a security approach against migrants. Rather than giving

³⁷¹ Reviglio, *supra* note 368.

³⁷² The other part was funded through the Italian ‘Missions Decree,’ the national legal framework through which the Italian government and parliament authorize and fund international military commitments. See, *Médecins sans Frontières*, *supra* note 20.

³⁷³ Out of EUR 465 million on projects in Libya under the EUTF for Africa and EUR 700 million in total. See: European Commission, *EU support on migration in Libya* (Feb. 2022), https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-03/EUTF_Libya_en.pdf.

³⁷⁴ European Union, *EU-Libya relations* (Feb. 11, 2022), https://www.eeas.europa.eu/eeas/eu-libya-relations_en.

³⁷⁵ In 2013, the EU has established the EU Border Assistance Mission to Libya (EUBAM) ‘to enhance the capacity of the Libyan authorities and agencies to manage the country’s borders and fight human trafficking and migrant smuggling,’ whose mandate has been extended to 30 June 2025: Council Decision 2013/233/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya), 2013 O.J. (L 138); Council Decision (CFSP) 2023/2063 of 25 September 2023 amending Decision 2013/233/CFSP on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya) ST/11852/2023/INIT, 2023 O.J. (L 238). This framework facilitates the implementation of the MoU concluded between Italy and Libya, which is not in line even with Italy’s own law, as per the Trapani Tribunal.

³⁷⁶ EUNAVFORMED Sophia mission received a mandate from the European Council of 20 June 2016 to provide training to the so-called ‘Libyan Coast Guard,’ which it did in 2016 and 2017, and was followed by the signature of a MOU between EUBAM and the Libyan Ministry of Justice: *EUBAM signs a Memorandum of Understanding with the Libyan Ministry of Justice* (Feb. 15, 2018), https://www.eeas.europa.eu/node/39921_en; Violeta Moreno-Lax et al., *The EU Approach on Migration in the Mediterranean, STUDY Requested by the LIBE committee*, PE 694.413, 129–130 (June 2021), [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694413/IPOL_STU\(2021\)694413_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694413/IPOL_STU(2021)694413_EN.pdf).

³⁷⁷ Yasha Maccanico, *Analysis, Italy renews Memorandum with Libya*, Statewatch (March 2020), <https://www.statewatch.org/media/documents/analyses/no-357-renewal-italy-libya-memorandum.pdf>.

migrants protection, it seeks to keep them out.”³⁷⁸ It is no secret that at the time of writing Libya is not an example of a functioning state. There can be no serious conversation about human rights safeguards by their “Border Guard,” which is more akin to a group of “thugs” equipped by the EU for hunting migrants at sea for profit.³⁷⁹ This did not prevent Malta from joining Italy and signing a Memorandum of understanding with Libya on 28 May 2020, drafted in the same terms as the one that Italy concluded, planning the creation of two coordination centers respectively in Valletta and Tripoli and asking the EU for financial support.³⁸⁰ The extent to which the EU has funded the Malta-Libya MoU remains unclear.³⁸¹

The well-documented direct or indirect contribution of European funding to Human Rights abuses by the “Libyan authorities” and their accomplices, is appalling. Estela Casajuana and Giorgia Jana Pintus explain in detail the “critical correlation between EU-funded border management programs [in Libya] and numerous instances of violence, implicating these authorities in activities that contravene human rights standards.”³⁸² The main beneficiaries of EU funding include the authorities in charge of the maritime control, including the so-called “Libyan Coast Guard”³⁸³ and the General Directorate for Combating Illegal Immigration (DCIM). These very beneficiaries are implicated in “actions amounting to crimes against humanity” as found in March 2023 by an UN Independent Fact-Finding Mission on Libya—*inter alia*, arbitrary detention, murder, torture, rape, enslavement; enforced disappearance and sexual slavery.³⁸⁴ The UN findings had no influence on the EU’s continued misrepresentation of a bunch of criminals it has equipped with boats and guns, tasking them to break its own law, as trustworthy partners.

The *modus-operandi* of refoulement by “proxy” by EU Member States and FRONTEX in the Mediterranean is as well-known,³⁸⁵ as its consequences are dire. The racialized passport poor face a high risk of sea interception/pullbacks by the so-called “Libyan Coast Guard” tipped by FRONTEX intelligence and equipped with assets sustained through EU funding and face violence, including firing and dangerous maneuvers among others, leading to casualties and shipwrecks.³⁸⁶ If they were not killed during the interception at sea, migrants are brought back to the Libyan ground

³⁷⁸ Médecins sans Frontières, *supra* note 20.

³⁷⁹ Urbina, *supra* note 11.

³⁸⁰ *Memorandum of Understanding Between the Government of National Accord of the State of Libya and The Government of The Republic of Malta in the Field of Combatting Illegal Immigration* <https://www.statewatch.org/media/documents/news/2020/jun/malta-libya-mou-immigration.pdf>.

³⁸¹ Moreno-Lax et al., *supra* note 376, at 130.

³⁸² Casajuana & Pintus, *supra* note 352, at 21.

³⁸³ The maritime authorities are the General Administration for Coastal Security (GACS) and the Libyan Coast Guard and Port Security (LCGPS).

³⁸⁴ U.N. HRC, *supra* note 358.

³⁸⁵ SHATZ, *supra* note 12; Moreno-Lax et al., *supra* note 376.

³⁸⁶ Casajuana & Pintus, *supra* note 352, at 21; Euractiv, *Exclusive: Libyans Fired at Rescuers while Performing a Rescue at Sea* (Jul. 9, 2023), <https://www.euractiv.com/section/migration/news/exclusive-libyans-fired-at-rescuers-while-performing-a-rescue-at-sea/>; Sea-Watch, *Episodes of Violence by the so Called Libyan Coast Guard and Libyan Coastal Security at Sea* (Jul. 2023) <https://shorturl.at/6s1Wj>; Sea-Watch, *So-called Libyan Coast Guard Firing Shots at Migrant Boat in Distress* (Jul. 2021), <https://shorturl.at/EKXUV>; Amnesty Int’l, *Libya: ‘No One Will Look for You’* (Jul. 15, 2021), <https://www.amnesty.org/en/documents/mde19/4439/2021/en/>; Amnesty Int’l, *Libya’s Dark Web of Collusion* (Dec. 11, 2017), <https://www.amnesty.org/en/documents/mde19/7561/2017/en/>.

and systematically forcibly detained in prison facilities where they are exposed to concentration camps like conditions:³⁸⁷ exploitation, forced labor, sexual slavery, widespread violence, especially against women and girls etc. while they do not have access to lawyers, health care, assistance, or protection. Those captured by EU proxies are also subjected to the risk of re-trafficking, forced expulsion and arbitrary detention.³⁸⁸ The actual *raison d'être* seems to be generating ransom from those, whom the so-called “Libyan Coast Guard” help the EU “save” from the sea.³⁸⁹ Others are enslaved.³⁹⁰ It goes without saying that those who survive are not sent to safe countries at all.³⁹¹

The Libyan “detention centers” are run by the DCIM and/or by local militias: “the DCIM (General Directorate for Combating Illegal Immigration) oversees detention centres where crimes against humanity have been committed, with the involvement of DCIM staff.”³⁹² Even if direct funding might be difficult to establish, it is undisputed that these centers are indirectly funded by the EU as they are overseen by the DCIM—the recipients of EU money for “migration management.”³⁹³ Importantly, it has been established that “official authorities” such as DCIM are in collusion with militias, traffickers and smugglers, “especially in the context of intercepting, returning and detaining migrants” and this situation “dates back to the origin of EU cooperation with Libya”³⁹⁴ potentially turning the EU, which is funding and supporting this criminal system with intelligence and training, into one of the biggest smugglers of human beings in the world today. In fact, “the Libyan militias and armed groups that gravitate in a more or less official way around the authorities, make profit either from smuggling migrants and enlisting them in their armies, or by being recognized as legitimate interlocutors.”³⁹⁵

The EU is thus to be credited, together with Italy, with the perfecting of the detention and smuggling industry in Libya, where all actors are expecting a “share of the pie.”³⁹⁶ EU money has created a fragmented criminal “migration industry” in the former Italian colony, which attracts many actors and where it became impossible to

³⁸⁷ DW, *Refugee mistreatment in Libyan trafficking camps* (Jan. 29, 2017), <https://www.dw.com/en/libyan-trafficking-camps-are-hell-for-refugees-diplomats-say/a-37318459>.

³⁸⁸ Casajuana & Pintus, *supra* note 352, at 27–28. *See also*: U.N. HRC, *supra* note 384; Human Rights Watch, *Libya Events of 2023* (2024) <https://www.hrw.org/world-report/2024/country-chapters/libya>; SOS Humanity, “*They Beat me Every Day*” – *Rescued Women’s Testimonies about Their Flight and Time in Libya* (n.d.), <https://sos-humanity.org/en/testimonies/refugee-stories/womens-testimonies-flight-libya/>.

³⁸⁹ UNHCR & Mixed Migration Center, “*On This Journey, No One Cares if You Live or Die*”, 15 (Jul. 2020), <https://www.unhcr.org/5f2129fb4>; CONCORD, *supra* note 20, at 19.

³⁹⁰ CNN, *supra* note 146.

³⁹¹ Through the Evacuation Transit Mechanism (ETM) which aims to evacuate migrants from Libya and was financed by the EUTF for Africa with EUR 52 million dedicated to it: European Commission, *supra* note 373. *See also*, *Constitutive Agreement Establishing the European Emergency Trust Fund for Stability and Addressing the Root Causes of Irregular Migration and Displaced Persons in Africa*, arts. 4–6 (Nov. 12, 2015).

³⁹² Casajuana & Pintus, *supra* note 352, at 27–28. *See also*: U.N. HRC, *supra* note 384, ¶¶42–44.

³⁹³ This includes detention centers under the exclusive control of the Libyan Ministry of Home Affairs, financed by Italy under Art. 2 of the MoU.

³⁹⁴ Casajuana & Pintus, *supra* note 352, at 28. *See also* pages 32–35 for a timeline of all the incidents between 2016 and 2023.

³⁹⁵ Agnese Pacciardi & Joakim Berndtsson, *EU border externalisation and security outsourcing* 48(17) J. OF ETHNIC & MIGR. STUD. 4010, 4022 (2022).

³⁹⁶ CONCORD, *supra* note 20, at 20.

distinguish between “state and non-state actors, private and public authorities, foreign and local players.”³⁹⁷ Agnese Pacciardi & Joakim Berndtsson explain that, “because of the impossibility to clearly separate the different roles and responsibilities of the several actors involved in IBM [integrated border management], neither the EU nor Italy can be clearly held accountable for the outcome of externalization practices”:³⁹⁸ EU lawlessness law at play.

In a nutshell, the European funding contributes, *inter alia*, to the hunting, capture, and trafficking of migrants by the “Libyan Coast Guard” it has equipped and supplies with intelligence.³⁹⁹ EU funds support, at least indirectly, detention centers in Libya, where the so-called Libyan authorities detain the people they intercept trying to reach the EU.⁴⁰⁰ Inhuman treatment in these concentration camp-like facilities where the hunted people who committed no crime are detained is widespread, as they are kept “in horrendous conditions”⁴⁰¹ and constantly abused. Thousands of people are detained indefinitely on no charge in the lawless spaces harnessed by the EU’s passport apartheid as a vital tool for the export of lawlessness, which is deployed to achieve Eurowhiteness goals by disapplying human rights and the Rule of Law. In this sense, the EU’s training and later use of the “Libyan Coast Guard” is similar to Russia’s deployment of the “Wagner Group” private army of “Putin’s cook” Prigozhin⁴⁰² in the African countries (before Prigozhin’s airplane exploded, that is), as both achieve similarly lawless goals by proxy. In fact, Wagner group and local warlords in Libya are reportedly in close cooperation not to miss out on the funding opportunity from the EU.⁴⁰³

The example of the creation of lawlessness in Libya using EU money is far from being isolated and we see EU funds directly or indirectly sponsoring the most obnoxious atrocities committed towards non-white migrants without any accountability in other places, be they in Tunisia or Turkey—as previously described—or further afield, where the EU’s presence is felt through the significant funds disbursed to promote and support racist violence on the ground. In general, funding repressive state agencies, including those in formerly genocidal countries, abounds. The creation of an intelligence center for Sudan’s secret police is one example, but more general “shopping lists,”—such as the one reported by Oxfam, which was sent by an official in Niger and included cars and aircraft, to be used as “incentives” for the development of anti-immigrant policies⁴⁰⁴—demonstrate that the EU *de facto* pays significant bribes to incentivize the export of lawlessness as part of the operation of its passport apartheid. The result is the orchestration of the intertwined operations of the governments of the poorest countries sometimes in collaboration

³⁹⁷ Pacciardi & Berndtsson, *supra* note 395, at 4022.

³⁹⁸ *Id.*

³⁹⁹ Urbina, *supra* note 11.

⁴⁰⁰ CONCORD, *supra* note 20.

⁴⁰¹ Tuuli Raty & Raphael Shilhav, *The EU Trust Fund for Africa Trapped Between Aid Policy and Migration Politics* (Oxfam 2020).

⁴⁰² BBC News, *The Wagner Group: Why the EU Is Alarmed by Russian Mercenaries in Central Africa* (Dec. 18, 2021) <https://www.bbc.com/news/world-africa-59699350>.

⁴⁰³ Aljazeera, *European Powers Allow Shadowy Libyan Group to Return Refugees* (Dec. 11, 2023) <https://www.aljazeera.com/features/longform/2023/12/11/with-europes-help-a-libyan-brigade-accused-of-killings-returns-refugees>.

⁴⁰⁴ Raty & Shilhav, *supra* note 401, at 20.

with smugglers and militias, as in Tunisia and Libya, in the context of their involvement in human trafficking and smuggling activities.⁴⁰⁵ Between 2015 and 2021, all this was made possible mostly through the EUTF for Africa, which was outside the EU budget and characterized by a profound lack of transparency, accountability, human rights guarantees and any democratic control.

B. The EUTF for Africa: the purse for EU lawlessness law

One of the main promoters of the passport apartheid through funding lawlessness in Africa has been the infamous EUTF for Africa. It has been implemented in twenty-six partner countries across the Sahel and Lake Chad, the Horn of Africa and North Africa.⁴⁰⁶ It is one of the four EU trust funds.⁴⁰⁷ EUTF for Africa was created at the Valletta Summit on Migration in November 2015 through a constitutive agreement⁴⁰⁸ concluded between the Commission—which had adopted a prior decision on it,⁴⁰⁹ and donor states—24 EU Member States,⁴¹⁰ the United Kingdom, Norway and Switzerland. The European Parliament’s consultation and approval was not deemed necessary for the creation of the Fund.⁴¹¹ The Fund was supposed to come to an end in December 2020 but was extended for a year until December 2021.⁴¹² The projects that it funded will run until June 2025.⁴¹³

The EUTF for Africa is an “EU Development Fund,” which is established outside the EU budget and therefore not automatically subject to European Parliamentary scrutiny.⁴¹⁴ Trust funds for emergency or post-emergency actions have their own

⁴⁰⁵ *Id.*; CONCORD, *supra* note 20.

⁴⁰⁶ See, https://trust-fund-for-africa.europa.eu/index_en.

⁴⁰⁷ There are three additional EU trust funds: the Bêkou EU Trust Fund focusing on stabilizing and reconstructing the Central African Republic (2014); the EU Regional Trust Fund in Response to the Syrian crisis (2014); the EUTF for peace-building in Colombia, set up after the signing of the Peace Agreement between the Colombian government and the FARC (2016).

⁴⁰⁸ *Constitutive Agreement*, *supra* note 391. The Director General for international Cooperation and Development signed the agreement. See also, European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa, *Board Meeting Minutes* (Nov. 12, 2015), https://ec.europa.eu/trustfundforafrica/sites/default/files/minutes_1st_eutf_for_africa_board_meeting_0.pdf, at 3.

⁴⁰⁹ *Commission Decision on the establishment of a European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa* C(2015) 7293 final (Oct. 20, 2015).

⁴¹⁰ *Constitutive Agreement*, *supra* note 391. Croatia, Cyprus and Greece do not appear in the constitutive agreement. However, Croatia and Cyprus both contribute to the Fund. See European Court of Auditors, *supra* note 152.

⁴¹¹ The role of the European Parliament in the creation of trust funds for emergency or post-emergency action has been reinforced in the subsequent regulation: *Parliament and Council Regulation 2018/1046, Financial rules applicable to the general budget of the Union*, 2018 O.J. (L 193) 1, art. 234.

⁴¹² *Commission Decision of 10.12.2020 amending Commission Decision C(2015) 7293 of 20.10.2015 on the establishment of a European Union Emergency Trust Fund for Stability and addressing root causes of irregular migration and displaced people in Africa*, C (2020) 8701 final (Dec. 10, 2020).

⁴¹³ European Commission, *Southern Neighborhood*, https://neighbourhood-enlargement.ec.europa.eu/european-neighbourhood-policy/southern-neighbourhood_en.

⁴¹⁴ Art. 42 of Council Regulation 2015/323, Financial regulation applicable to the 11th European Development Fund, 2015 O.J. (L 58) 17 (repealed by Council Regulation 2018/1877, Financial regulation applicable to the 11th European Development Fund, 2018 O.J. (L 307) 1 and replaced by its Art. 35). Until the NDICI Regulation (see Part V(e) *infra*), the Development Fund was not regulated by the common budgetary rules and procedures for the implementation of the Union’s instruments for financing external action.

flexible governance rules, management modes and conditions.⁴¹⁵ Emergency is the key aspect of the fund “specifically designed for emergency and post-emergency situations where experience has shown that the weakness of the local administrations combined with a sudden increase in the number of donors require a strong coordination of the international community.”⁴¹⁶ From the official documents we learn that the EUTF for Africa is very malleable⁴¹⁷ in achieving its stated aim of contributing to a flexible, speedy and efficient delivery of “immediate and concrete results in sensitive and rapidly changing fragile situations”⁴¹⁸ “to foster stability and to contribute to better migration management”⁴¹⁹ and helping to address “the root causes of destabilization, forced displacement and irregular migration, by promoting economic and equal opportunities, strengthening resilience of vulnerable people, security and development”⁴²⁰—Eurospeak for maintaining the passport apartheid and deploying EU lawlessness law in order to marginalize the racialized passport poor even further. The Fund has been presented as one of a number of “[i]nnovative instruments to offer targeted support”⁴²¹ “to those partner countries which make the greatest efforts but without shying away from negative incentives.”⁴²² The EUTF for Africa has mainly been used to impose the European migration management agenda elsewhere around the globe, prioritizing the objectives of the EU’s lawlessness law to solidify and perfect the EU’s passport apartheid over any African aspirations.⁴²³ The Fund’s deployment is thus in direct conflict with EU values, especially the Rule of Law and human rights protection.

As of December 2023, the money spent amounted to more than five billion euros.⁴²⁴ The Fund allegedly brings greater coherence between contributions, “reducing the risk of fragmentation of aid and ensuring a new mutualization of means and capacities,”⁴²⁵ but almost 90% comes from the EU. The Fund was presented as allowing “for the effective pooling of resources from various EU funding sources into a single instrument,”⁴²⁶ but in fact most of the EU contribution came from the Development Fund (EUR 3,385.8 million). The rest came from the EU budget (EUR

⁴¹⁵ Art. 187 of Parliament and Council Regulation 2012/966, Financial rules applicable to the general budget of the Union, 2012 O.J. (L 298) 1 (repealed by Parliament and Council Regulation 2018/1046, Financial rules applicable to the general budget of the Union, 2018 O.J. (L 193) 1) and replaced by its Art. 234).

⁴¹⁶ Rec. 9, Preamble of the *Commission Decision on the establishment of a European Union Emergency Trust Fund*, *supra* note 409.

⁴¹⁷ European Court of Auditors, *supra* note 152, at 4.

⁴¹⁸ *Commission Decision on the establishment of a European Union Emergency Trust*, *supra* note 409.

⁴¹⁹ 2015 Valletta Summit on Migration, *Valletta Summit 11–12 November 2015 Action Plan 1–2* (2015) https://www.consilium.europa.eu/media/21839/action_plan_en.pdf.

⁴²⁰ *Id.* at 2. *Commission Decision on the establishment of a European Union Emergency Trust Fund*, *supra* note 409, rec. 12 of the Preamble; art. 1(2).

⁴²¹ 2015 Valletta Summit, *supra* note 419, at 2.

⁴²² *European Agenda on Migration*, *supra* note 206, at 2.

⁴²³ Clare Castillejo, *The European Union Trust Fund for Africa* (German Institute of Development and Sustainability (IDOS), Briefing Paper No. 5, 2017).

⁴²⁴ EUR 5 061.7 million, to be exact: European Commission, *EU Emergency Trust Fund for Africa, Annual Report 2023*, 17 (2024), https://trust-fund-for-africa.europa.eu/document/download/2e5df06d-1998-4a5a-b2d8-b343fe8dc1b6_en?filename=EUTF-REPORT-2023-EN-WEB.pdf.

⁴²⁵ *Commission Decision on the establishment of a European Union Emergency Trust Fund*, *supra* note 409, rec. 10 of the Preamble.

⁴²⁶ *Id.*

1,052.7 million)⁴²⁷ and the state donors (623.2 million).⁴²⁸ At the end of December 2023, the signed contracts amounted to EUR 4 909.9 million.⁴²⁹ Instead of being implemented by the Commission, EUTF for Africa projects have been implemented by a various array of other actors:⁴³⁰ the UN (31.2%), EU Member States and other states donors (30.1%), NGOs (16.5%), partner countries (8.8%), international organizations (4.5%) and private entities (4.6%).

The Fund is characterized by attempts to undermine transparency and destroy accountability in spending *by design*—not a breakdown of good intentions.⁴³¹ It is therefore unsurprising that a Fund with a high level of flexibility for concluding contracts was presented as being absolutely indispensable from the start by the designers of this vital tool of EU lawlessness law.⁴³² The resulting flexibility is marked not only by a lack of transparency, but also by the effective absence of any specific framework for the expenditure:⁴³³ the initial strategic guidance was framed so broadly that it attracted strong criticism from the European Court of Auditors.⁴³⁴

It is unquestionable that even the most flexible and non-transparent fund outside the EU budget cannot deploy EU money to sponsor human rights violations and other violations—direct or indirect—of EU law.⁴³⁵ It is abundantly clear from the example of Libya and countless others that the EUTF for Africa has *not* been used in line with this basic principle. This is also what the EU Ombudsman found: “EUTFA projects covered by the inquiry are implemented in countries with major governance issues and, in many cases, with poor human rights record.”⁴³⁶ In fact, the “measures in place were not sufficient to ensure the human rights impact of EUTFA projects was properly assessed.”⁴³⁷ Indeed, the European Commission does not conduct human rights impact assessments related to the EUTF for Africa funded projects and more generally for migration projects.⁴³⁸ When projects fiches refer to human rights and non-refoulement, this is usually mainly in generic terms and “not part of the operational elements of the action documents,” as in the case of Tunisia.⁴³⁹ Furthermore, given that the Fund is not formally part of the EU budget and is governed by exceptionally flexible rules, it does not comply by default with the key requirements of the usual governance and

⁴²⁷ Including the Development Cooperation Instrument (DCI), the European Neighbourhood Instrument (ENI), the Asylum, Migration and Integration Fund (AMIF) and funding from the Directorate-General for European Civil Protection and Humanitarian Aid Operations (DG ECHO).

⁴²⁸ European Commission, *supra* note 424, at 17.

⁴²⁹ *Id.* at 18.

⁴³⁰ While EU budget decisions are usually implemented by the Commission: art. 187(2) of Regulation 2012/966, Financial rules are applicable to the general budget of the Union (repealed by Regulation 2018/1046), referring to Art. 58(1)(c)(ii), (v) & (vi). Thomas Spijkerboer, *Migration Management Clientelism*, 48(12), J. OF ETHNIC & MIGRATION STUD. 2892, 2894 (2022).

⁴³¹ Raach et al., *supra* note 472, at 45.

⁴³² 2015 Valletta Summit, *supra* note 4192, at 1–2.

⁴³³ OXFAM, *supra* note 146.

⁴³⁴ European Court of Auditors, *supra* note 152.

⁴³⁵ *Front Polisario*, EU:T:2015:953.

⁴³⁶ European Ombudsman, *Decision on how the European Commission assessed the human rights impact before providing support to African countries to develop surveillance capabilities* (Case 1904/2021/MHZ).

⁴³⁷ *Id.*

⁴³⁸ Strik & Robbesom, *supra* note 202, at 200; Raach et al., *supra* note 472, at 46. *See also*: https://twitter.com/Tineke_Strik/status/1638903165792800769.

⁴³⁹ Raach et al., *supra* note 472, at 53–54.

democratic process for development financial instruments, such as the oversight of spending and project selection.⁴⁴⁰ Moreover, as Spijkerboer explains, “all expenditure under the EUTF Africa is exempted from the obligation of public procurement procedures.”⁴⁴¹

The Fund is run by a “Commission-driven management structure”;⁴⁴² the Trust Fund Board (also called the Strategic Board) and the Operational Committee, both composed of the EU Commission and the main donor representatives.⁴⁴³ The management of the Trust Fund is done by the Commission and is responsible for the implementation of the actions financed by the Board.⁴⁴⁴ The other Member States⁴⁴⁵ and later the European Parliament⁴⁴⁶ can only act as observers on the Trust Fund Board, which raises serious question in light of the principle of institutional balance and Democracy: the European Parliament, which enjoys budgetary authority,⁴⁴⁷ is not involved in taking or reviewing decisions at any stage. Although there were slight improvements following the Auditors’ report, especially in terms of communication and visibility, the core idea of spending money under the complete obscurity of EU lawlessness law remains. This means, essentially, that the Fund constitutes a tool for the donors to promote their own domestic political priorities and goals, prioritizing “bilateralism and Member State-specific national priorities,”⁴⁴⁸ mainly with EU taxpayer money (in light of its blurred and flexible spending rules and objectives).⁴⁴⁹ The EU thus endorses and funds Italy’s priorities in Libya.⁴⁵⁰ Italy is not an exception, and Bartels is right that the Fund primarily benefits the Member States of the EU with post-colonial relationships with Africa.⁴⁵¹

It is even less surprising in this context that the “partners,” i.e. the former colonies of European nations to which the lawlessness law is exported, have no say over this process: they *may* be invited as observers for both the Trust Fund Board and the Operational Committee.⁴⁵² African ownership is also much weaker than within traditional European cooperation instruments. The EUTF for Africa is purely transactional,⁴⁵³ due to its unbalanced character.⁴⁵⁴ The EU pays for what it exports.

⁴⁴⁰ Lilian Tsourdi, *Beyond the ‘Migration Crisis’*, UM LAW BLOG (Feb. 11, 2020), <https://www.maastrichtuniversity.nl/blog/2020/02/beyond-%E2%80%9Emigration-crisis%E2%80%99-three-key-challenges-frontex-and-easo>. The ‘EUTF produced a ‘market’ of non-transparent “direct agreements”: Darshan Vigneswaran et al., *Capitalizing on a crisis: the European Union Trust Fund for Africa*, EUR. J. INT’L REL. 2, 12–13 (2024).

⁴⁴¹ Spijkerboer, *supra* note 430, at 2895.

⁴⁴² *Id.*

⁴⁴³ *Constitutive Agreement*, *supra* note 391, arts. 4–6.

⁴⁴⁴ *Id.*, arts 4(2) & 4(7).

⁴⁴⁵ *Id.*, art. 6(1)(2)(b). They only may be invited as observers for the Operational Committee.

⁴⁴⁶ *Id.*

⁴⁴⁷ TEU, art. 14.

⁴⁴⁸ Carrera, *supra* note 210, at 47–48.

⁴⁴⁹ Raty & Shilhav, *supra* note 401, at 20; *see also*, European Court of Auditors, *supra* note 152.

⁴⁵⁰ CONCORD, *supra* note 20.

⁴⁵¹ Inken Bartels, *Money against Migration* (Heinrich Böll Stiftung 2019), https://eu.boell.org/sites/default/files/money_against_migration.pdf, at 42.

⁴⁵² *Constitutive Agreement*, *supra* note 391, arts 5(1)(1) & 6(1)(1).

⁴⁵³ Castillejo, *supra* note 423.

⁴⁵⁴ Médecins sans Frontières, *supra* note 20.

Money from the Fund has been the “‘main bargaining chip’ of the Migration Partnership Framework.”⁴⁵⁵ Officials confirm that EUTF for Africa is a way to “supply some oil for the machine [...] the machine had to produce all-encompassing agreements on migration.”⁴⁵⁶ And of course these “‘partnerships’ are, again, partnerships in the name only, emerging as ‘the most openly interest-driven of the EU’s migration initiatives, and indeed the one[s] that appear [...] furthest removed from the principles of genuine partnership.’”⁴⁵⁷ Clare Castillejo shows that the projects financed under the EUTF through partnerships for migration management “have suffered from inadequate local ownership, weak alignment with local priorities and systems, untransparent selection procedures, slow implementation, and lack of sustainability.”⁴⁵⁸ There is neither a strong consensus among nor within EU Member States on the Fund’s activities. For example, while Italy is keen to use positive and negative incentives based on partnerships, Ireland is much more skeptical and is much more worried about EU values and principles.⁴⁵⁹ The same seems to be true among and within EU institutions.⁴⁶⁰ Not everyone is convinced that it is a good thing to spend billions to make sure that the core principles of own law are broken in the treatment of racialized people far away from the EU’s own borders.

Contesting this assault on the Rule of Law and human rights is theoretically possible. Bas Schotel is right in contending that annulment actions targeting the Commission’s decision regarding funding allocation, or even the Council decision establishing the migration funds, could potentially restore some legal accountability for the spending,⁴⁶¹ if the difficulty with “concern” in the case of non-privileged applicants could be overcome. The problem is more profound, however, than merely bringing an action for annulment before the Court. As we have seen above, based on the *EU-Turkey Deal* but also the *Sharpston* cases,⁴⁶² the Court itself is not necessarily always an independent arbiter.⁴⁶³ Indeed, it is one of the architects of the EU’s lawlessness law, helping the EU elude any legal responsibility. Having placed the EU-Turkey abuses outside the law, there is absolutely no guarantee that funding and equipping the criminal members of the “Libyan Coast Guard” would not be equally waved through by the ECJ as falling outside the scope of EU law.

C. “Migration management”: the antithesis of the goal of cooperation and development

It is abundantly clear that “EUTF projects cannot be in line with the principles of development aid”:⁴⁶⁴ money is heaped onto actors who are responsible for atrocious human rights violations, and those funds do not effectively contribute to the long-term

⁴⁵⁵ *Id.* at 13.

⁴⁵⁶ Interviews conducted by and cited in Vigneswaran et al., *supra* note 440.

⁴⁵⁷ Castillejo, *supra* note 206, at 2. Beyond the money received through the partnerships, third-country partners also benefit from wider EUTF programming.

⁴⁵⁸ *Id.* at 2.

⁴⁵⁹ *Id.* at 9.

⁴⁶⁰ *Id.* at 10. European External Action Service (EEAS) and DG DEVC apparently disagree with the Council Secretariat and DG Home, which prioritize returns.

⁴⁶¹ Schotel, *supra* note 151, at 82–83.

⁴⁶² Kochenov & Butler, *supra* note 321.

⁴⁶³ Kochenov, *Restoring the Dialogical Rule of Law*, *supra* note 172.

⁴⁶⁴ CONCORD, *supra* note 20, at 6.

stability of the country as overtly intended. Yet, the stated goal of the EUTF for Africa is to foster a better migration management and address “the root causes of irregular migration” under the legal and financial umbrella of development cooperation. Zaun and Natermoz demonstrate that the EUTF for Africa was a way for the Commission to reframe the so-called “migration crisis” as a merely “technocratic problem requiring the use of development aid to address its root causes in Africa.”⁴⁶⁵ Although “development” does not receive any definition in the Treaties, the TFEU makes clear that the primary objective of development cooperation policy is “the reduction and, in the long term, the eradication of poverty.”⁴⁶⁶ The TEU equally specifies that the EU aims to “foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty.”⁴⁶⁷

Among the four areas financed by the Fund, migration management is the one which has absorbed the most money: 31% (EUR 1 515.7 million). This is alongside 22% (EUR 1 101.1 million) on “[i]mproved governance and conflict prevention”; 28% (EUR 1 384.6 million) on “[s]trengthening resilience of communities”; and 17% (EUR 855.5 million) on “[g]reater economic and employment opportunities.”⁴⁶⁸ The 2023 report merged the two last areas which superficially became the bigger part in the report with 45% of the total budget of the Fund.⁴⁶⁹ North African countries, including Libya,⁴⁷⁰ Morocco,⁴⁷¹ Tunisia,⁴⁷² and Egypt,⁴⁷³ mostly received money for migration management, even if unrelated to border management as such.⁴⁷⁴ In many instances, projects funded under the banner of “development” *stricto sensu* were approved as an incentive for the partner country to address the “root causes of irregular migration” i.e. better preventing migration of the racialized passport poor to the EU.⁴⁷⁵

The projects funded do not fit the development aspect of the Fund, as they have no direct connection with strengthening development and the eradication of

⁴⁶⁵ See Natascha Zaun & Olivia Natermoz, *Depoliticising EU Migration Policies*, 49(12) J. OF ETHNIC & MIGR. STUD. 2986, 2989, 2992 (2023).

⁴⁶⁶ TFEU, art. 208(1).

⁴⁶⁷ TEU, art. 21(2)(d).

⁴⁶⁸ European Commission, *supra* note 424, at 19.

⁴⁶⁹ *Id.*, at 18.

⁴⁷⁰ The total amount of EUR 465 million is divided in three pools: ‘protection and assistance to those in need’ (EUR 236,9 million), ‘Integrated Border Management’ (EUR 59 million) (under the program entitled ‘Support to Integrated Border and Migration Management in Libya (SIBMMIL) implemented by the Italian Ministry of Interior’), and ‘Stabilisation of Libyan Municipalities’ (EUR 161,9 million): European Commission, *supra* note 373.

⁴⁷¹ Out of EUR 170,2 million, EUR 98,7 million has been dedicated to migration management (including borders) and EUR 43,59 million to border management *stricto sensu*.

⁴⁷² EUR 18,1 million has been dedicated to migration management only. Casajuana & Pintus, *supra* note 352, at 15; Fatma Raach et al., *Country report Tunisia*, 19 (Brussels: CEPS 2022), <https://www.asileproject.eu/>, at 59 and Giuffrè et al., *supra* note 295, at 58.

⁴⁷³ The total of the disbursed fund (EUR 47,5 million) has been dedicated to migration management only.

⁴⁷⁴ European Commission, *EU Emergency Trust Fund for Africa, Annual Report 2022*, 1, 74 (2023), https://trust-fund-for-africa.europa.eu/document/download/2e5df06d-1998-4a5a-b2d8-b343fe8dc1b6_en?filename=EUTF-REPORT-2023-EN-WEB.pdf.

⁴⁷⁵ See OXFAM, *supra* note 146. Two-thirds of the EUTF for Africa was allocated to development-focused projects, yet ‘most of them were approved with the objective of “addressing the root causes of migration”’; Raty & Shilhav, *supra* note 401.

poverty.⁴⁷⁶ Even if we were to take the “development goals” pursued by the EUTF for Africa seriously and consider—*quod non*—that migration management is related to them, the truth is that the Fund is run in oblivion of all scientific insights on migration or, indeed, on migration management. The scientific evidence is abundantly clear: development *implies* migration.⁴⁷⁷ In other words, while “tackling the roots of irregular migration” could be an attractive political slogan to some, what it offers runs *counter* to the objective of development.

This is precisely why the EU itself, in order to achieve growth and prosperity, started with the four freedoms and an emphasis on the free movement of persons, also making “irregular” migration among EU citizens in the EU almost impossible, since free movement is the founding principle and the abolition of borders—a key objective.⁴⁷⁸ Indeed, the “root causes of migration” narrative instead of development uniquely reflects the Eurowhiteness mindset: “Europeans” should move freely and enjoy rights, while “colonials” should stay where they are. Obstructing the racialized Brits from benefiting from EU rights—as we saw greenlighted in *Kaur*⁴⁷⁹—is a telling example of putting this vision into practice before the export of mass crimes started.

It is thus not surprising at all that “migration management” cannot help reaching any development goals, especially when huge amounts of money have been used as a leverage to incentivize certain African partners to comply with the EU migration agenda implying that the racialized passport poor should never move—a diversion from the Treaty objective of the “eradication of poverty.” Castillejo observes that this diversion “appears to be part of a broader trend towards the securitization of EU development assistance.”⁴⁸⁰ The money is given to the most powerful actors in terms of their migration management capabilities, rather than to those most in need, or those most able or best positioned to initiate a change for the better. Not only does the Fund divert EU money from poverty alleviation⁴⁸¹ but also from the poorest African countries in need.⁴⁸² Even the Pact for Migration is now open about the fact that financial incentives (i.e. development funds) will go in priority to strategic migration source and transit third countries, giving strong priority to Eurowhiteness and passport apartheid over aid.⁴⁸³

The upholding and reinforcement of the EU’s passport apartheid in the least developed parts of the world—far from EU’s borders *sensu stricto*—emerges as the core vision of “development” that the EU offers to its former colonies and other least affluent spaces on the globe. “Development” for the EU is “migration management”⁴⁸⁴

⁴⁷⁶ By analogy, see *Parliament v. Comm’n*, Case C-403/05, EU:C:2007:624 (annulling aid to the Philippines, due to be spent on border protection, as it is not ‘development’). Moreover, ‘even if a measure contributes to the economic and social development of developing countries, it does not fall within development cooperation policy if it has as its main purpose the implementation of another policy’; *Comm’n v. Council of the European Union*, Case C-377/12, EU:C:2014:1903, ¶¶48-49.

⁴⁷⁷ Zaun & Nantermoz, *supra* note 165, at 511, and the literature cited therein.

⁴⁷⁸ With some reservations: Charlotte O’Brien, *Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights* (2016) 53 COMMON MKT. L.REV. 937; Kochenov, *supra* note 27.

⁴⁷⁹ See Part II(b) *supra*.

⁴⁸⁰ Castillejo, *supra* note 423.

⁴⁸¹ Raty & Shilhav, *supra* note 401; Vigneswaran et al., *supra* note 440 and the literature cited therein.

⁴⁸² Vigneswaran et al., *supra* note 440.

⁴⁸³ *Id.*, at 20.

⁴⁸⁴ OXFAM, *supra* note 146, at 4.

preventing migration of the racialized passport poor, while, to quote Milanović, migration *is* in fact development.⁴⁸⁵ Even if it is not achieved through migration *sensu stricto*—development *implies* migration and not clamping down on it.⁴⁸⁶ It has been convincingly shown, that the EU’s use of the “pseudo-causal narrative” —addressing the root causes of migration through development assistance to countries of origin and transit—is vacant at its core.⁴⁸⁷ In fact, “it contradicts the broad academic consensus that development fuels migration rather than stops it.”⁴⁸⁸ The designers were unquestionably very well aware from the outset that the goals pursued by the Fund were unrealistic and that the narrative they backed with billions of euros relies on disproven causal claims.⁴⁸⁹ No surprise therefore that EU agencies have been unable to demonstrate that the EUTF for Africa achieved progresses towards the goal of addressing the root causes of the 2015–2016 migration “crisis.”⁴⁹⁰

The Commission made sure that the implementation of the EUTF for Africa was monitored and evaluated positively, though with a significant delay,⁴⁹¹ and despite the obvious lack of demonstrable progress towards reaching the foundational objectives of the Fund.⁴⁹² The urgent imperative of funding EU lawlessness law made the EU deny not only the criminal outcomes, but also the most evident inefficiency and counter-productivity of the Fund for *all* objectives (and regardless whether they are compatible with each other): migration management, fighting against the root causes of irregular migration, development and poverty outside Europe. Countless sociological and political explanations have been put forward in the literature to explain for the unwillingness and incapacity of the EU to acknowledge the inefficiency of the Fund.⁴⁹³ These explanations ignore the fact that the Fund has been efficient in one aspect: the construction of a lawless zone for the racialized passport poor, making sure that there is no one to be held accountable for human rights abuses which have been presented as “collateral” damage of the alleged “greater” policies (which in fact merely imply the policing of Eurowhiteness).

D. The aftermath of EUTF for Africa: NDICI Regulation

The EUTF for Africa came to an end in late December 2021 and has been transposed into the EU Budget under the Neighborhood, Development and International Cooperation–Global Europe Instrument (NDICI—around EUR 79,5

⁴⁸⁵ MILANOVIĆ, *supra* note 45.

⁴⁸⁶ Vigneswaran et al., *supra* note 440, at 4.

⁴⁸⁷ See Zaun & Nantermoz, *supra* note 165. See also Hein de Haas, *Turning the Tide? Why Development Will Not Stop Migration*, 38 DEVELOPMENT & CHANGE 821 (2007).

⁴⁸⁸ Zaun & Nantermoz, *supra* note 165, at 511, and the literature cited therein.

⁴⁸⁹ *Id.*

⁴⁹⁰ Vigneswaran et al., *supra* note 440.

⁴⁹¹ See, *Id.* It took two years (Oct. 2016–Oct. 2018) for the Commission to put in place a monitoring and evaluation system (the so-called Monitoring and Learning systems). The monitoring and evaluation system was a failure from the outset given the fact that the very premise of the Fund (linking the root cause of irregular migration and development) was clearly flawed.

⁴⁹² See Nathalie Welfens & Saskia Bonjour, *Seeking Legitimacy Through Knowledge Production*, 61(4) J. COMMON MKT. STUD. 951, 951 (2023); Vigneswaran et al., *supra* note 440.

⁴⁹³ Spijkerboer, *supra* note 430; Vigneswaran et al., *supra* note 440; Zaun & Nantermoz, *supra* note 465.

billion).⁴⁹⁴ This instrument merges former EU external financing instruments and covers development cooperation with third-countries.⁴⁹⁵ Ten percent of the NDICI is devoted to supporting management and governance of migration.⁴⁹⁶ This is not the full amount: additional funds outside the NDICI are available to cover the externalization of immigration management: the new multiannual financial framework (MFF) for 2021–2027 allocates EUR 22.7 billion to “Migration and border management.”

Looking closer at the functioning and application of the NDICI Regulation, scholars conclude that “the same projects continue to receive support.”⁴⁹⁷ Behind the façade of better regulation, transparency and accountability, most flaws of the EUTF for Africa’s grave misappropriation of public funds for illegal purposes are now institutionalized and legalized *within* the EU budget. Four reasons explain this state of affairs. Firstly, the NDICI Regulation has formalized the highly contentious relationship between migration objectives (including migration management and fighting the roots of irregular migration) and development, which existed under the EUTF for Africa, and which is as impossible to justify now as it was before. Secondly, the NDICI Regulation has successfully transposed and formalized another controversial aspect of the EUTF for Africa into the EU budget: the so-called “more for more” approach “whereby countries are rewarded for migration cooperation with additional funding.”⁴⁹⁸ Thirdly, there is a serious lack of transparency plaguing NDICI Regulation’s application, which greatly affects the monitoring and democratic scrutiny of the NDICI migration-related projects by the European Parliament. As Estela Casajuana and Giorgia Jana Pintus explain, “this opacity raises concerns about the accountability of the decision and makes it even more difficult to gauge how the allocated funds will be distributed and utilized.”⁴⁹⁹ Finally, as for the EUTF for Africa, the European Commission completely disregards the human rights aspect of the projects and activities funded under the NDICI, with the absence of any *ex-ante* and *ex-post* monitoring and assessment of this aspect of its funding, while the respect for human rights constitutes a *sine qua non* condition for the release of the funds under Articles 3, 8 and 29 of the NDICI Regulation.⁵⁰⁰

⁴⁹⁴ Regulation (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, amending and repealing Decision No 466/2014/EU and repealing Regulation (EU) 2017/1601 and Council Regulation (EC, Euratom) No 480/2009, 2021 O.J. (L 209) 1 (hereafter: ‘NDICI Regulation’).

⁴⁹⁵ Except for pre-accession beneficiaries and the overseas countries.

⁴⁹⁶ NDICI Regulation, rec. 51, preamble.

⁴⁹⁷ Casajuana & Pintus, *supra* note 352, at 37–38.

⁴⁹⁸ *Id.* at 12.

⁴⁹⁹ *Id.* at 47.

⁵⁰⁰ *Eg. Id.* at 43. European Commission, *Action Document to support countries in the Southern Neighbourhood for the management of migration flows for 2023* (Annual Action Plan), <https://shorturl.at/rLRcu>. See also European Commission, *Action Document for Support to Cross-Border Cooperation and Integrated Border Management in North Africa* (2022), <https://shorturl.at/J9IIT>; European Commission, *Action Document for EU Support to Border Management Institutions in Libya and Tunisia* (2021), <https://shorturl.at/5in0f>.

VI. THE APEX OF EU LAWLESSNESS LAW: FRONTEX AND THE DILUTION OF RESPONSIBILITY TO ZERO

FRONTEX, an EU Agency, which shares responsibility for border management with the Member States, is the Agency of EU lawlessness law *par excellence*.⁵⁰¹ The fact that FRONTEX is accountable to the European Parliament and to the Council⁵⁰² is a stark illustration of the meaninglessness of accountability structures overtly in place in the EU.⁵⁰³ The ECJ does not help at all either: the standing rules are interpreted in such a way that bringing a successful case against FRONTEX has proven *de facto* impossible.⁵⁰⁴ The result is the Agency's absolute impunity.

FRONTEX activities at the EU's borders extend across the Union's Eastern and Southern rim: the Western Balkans, Greece, Cyprus, Italy and Spain.⁵⁰⁵ It has been proven that in most of these places, FRONTEX has either actively or passively been involved in violating human rights. In 2020, a joint investigation by *inter alia* Bellingcat, Lighthouse Reports and *Der Spiegel* revealed that the Agency had knowledge of the pushbacks at the Greek–Turkish border. It actively cooperated with the authorities involved in the illegal pushbacks and collective expulsions.⁵⁰⁶ One year later, the European Parliament report showed that the Agency was in possession of “evidence in support of allegations of fundamental rights violations in Member States with which it had a joint operation, but failed to address and follow-up on these violations.”⁵⁰⁷ Following the leak in July 2022 of some parts of an OLAF report⁵⁰⁸ confirming the Agency's grip activities, FRONTEX's Executive Director, Fabrice Leggeri resigned.⁵⁰⁹

Not much has changed since then: lawlessness rules, while Mr. Leggeri now represents the French extreme right in the European Parliament. Despite the established facts that the Greek coastguard caused the deaths of dozens of the

⁵⁰¹ Parts of this section draw on Ganty et al., *supra* note 9.

⁵⁰² EBCG Regulation, art. 6.

⁵⁰³ Mariana Gkliati, *Decoding Frontex's fragmented accountability mosaic and introducing systemic accountability - System Reset*, 30 EUR. L.J 197 (2024) (Early view).

⁵⁰⁴ See *SS & ST v. European Border and Coast Guard Agency (FRONTEX)*, Case T-282/21, EU:T:2022:235; *ST v. European Border and Coast Guard Agency (FRONTEX)*, Case T-600/22, EU:T:2023:776 (the appeal is pending: Case C-62/24 P).

⁵⁰⁵ FRONTEX, *Operations*, <https://shorturl.at/7gvfl>.

⁵⁰⁶ Waters et al., *supra* note 20.

⁵⁰⁷ Report of the European Parliament FRONTEX Scrutiny Working Group: European Parliament, LIBE Committee on Civil Liberties, Justice and Home Affairs, *Report on the fact-finding investigation on FRONTEX concerning alleged fundamental rights violations*, Rapporteur: Tineke Strik (July 14, 2021), https://www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG_en.pdf.

⁵⁰⁸ FRONTEX refused to disclose it: *Management Board conclusions from the extraordinary MB meeting of 28–29 April 2022*, <https://frontex.europa.eu/media-centre/management-board-updates/management-board-conclusions-from-the-extraordinary-mb-meeting-of-28-29-april-2022-nr08YV>. See also: Euronews, *EU Border Agency Frontex Covered up Illegal Migrant Pushbacks, Says Report* (Oct. 14, 2022) <https://shorturl.at/2ELeX>.

⁵⁰⁹ Statewatch, *FRONTEX Investigations: What changes in the EU border agency's accountability*, (2021), <https://www.statewatch.org/analyses/2021/FRONTEX-investigations-what-changes-in-the-eu-border-agency-s-accountability/>; Lighthouse Reports, *FRONTEX Chapter III: Agency in Turmoil*, (2021), <https://www.lighthousereports.nl/investigation/FRONTEX-chapter-iii-agency-in-turmoil/>; Le Monde, *Former Frontex Boss Joins France's Far-right Party for the EU Elections* (Feb. 17, 2024), <https://shorturl.at/2rtmu>.

racialized passport poor in the Mediterranean over a three-year period in violent pushbacks, FRONTEX has still not suspended or terminated its activities there in violation of Article 46 of the FRONTEX Regulation.⁵¹⁰ Cases have been brought before the General Court against FRONTEX for its failure to act, but all have been dismissed so far.⁵¹¹

Reflecting on the dramatic Adriana Shipwreck which led to the drowning of 600 men, women and children who had departed from Libya on June 10, 2023—the European Ombudsman explained that the EU legal and operational framework is not built adequately to respond to maritime emergencies.⁵¹² Outside of Greek waters the killings and pull-backs facilitated by FRONTEX are more significant still. The Agency participates in violent pull-backs in Libya,⁵¹³ including by the so called “Libyan Coast Guard”⁵¹⁴ by serving, in the words of Ian Urbina, as their “air force,”⁵¹⁵ sharing with this EU’s proxy force the locations of boats carrying the racialized passport poor.⁵¹⁶ Simultaneously, FRONTEX helps create the fog of impunity surrounding the criminal operations by the Member States. OLAF confirmed that “Frontex surveillance assets were deliberately diverted in order to avoid witnessing ‘pushbacks.’”⁵¹⁷

At the Eastern borders of the Union, according to Amnesty International, FRONTEX is involved, either actively or passively, in human rights violations against racialized migrants at the Belarusian border with Latvia and Lithuania, operating where “persistent and serious” human rights violations are taking place.⁵¹⁸ There is overwhelming evidence that FRONTEX has also been ignoring human rights violations at the Bulgarian border.⁵¹⁹ Even if FRONTEX stopped its activities in Lithuania after the ECJ judgment of June 2022 condemning the push-backs⁵²⁰ (not having seen any need to do this earlier⁵²¹), it only did so at the request of the Lithuanian

⁵¹⁰ Statewatch, *Greek border deaths* (Jun. 20, 2024), <https://shorturl.at/4AIrG>.

⁵¹¹ See *SS & ST*, EU:T:2022:235; Case T-600/22, *ST*, EU:T:2023:776.

⁵¹² <https://www.ombudsman.europa.eu/en/doc/correspondence/en/182671>.

⁵¹³ See Moreno-Lax et al., *supra* note 376, at 77; ECRE, *Med: Investigations Reveal Frontex’ Complicity in Interceptions and Returns in Libya*, Weekly Bulletin (Apr. 30, 2021) and sources referred to therein. See also Shatz & Branco, *supra* note 12; Federica Marsi et al., *European powers allow shadowy Libyan group to return refugees*, ALJAZZERA (Dec. 11, 2023), <https://shorturl.at/KinZ4>; Bashar Deeb et al., *Frontex and the Pirate Ship*, LIGHTHOUSE REPORTS (Dec. 11, 2023); Statewatch, *Frontex collaboration with Libya: “we call them and try to persuade them to take them back”* (Jun. 12, 2024) <https://shorturl.at/9Y74D>.

⁵¹⁴ See Part V(a) *supra*.

⁵¹⁵ Urbina, *supra* note 155.

⁵¹⁶ See Moreno-Lax et al., *supra* note 376, at 77.

⁵¹⁷ OLAF, *supra* note 11. See also, *Conclusions of the European Ombudsman on EU search and rescue following her inquiry into how the European Border and Coast Guard Agency (Frontex) complies with its fundamental rights obligations in the context of its maritime surveillance activities, in particular the Adriana shipwreck* (Mar. 7, 2024), <https://www.ombudsman.europa.eu/en/doc/correspondence/en/182671>.

⁵¹⁸ Amnesty Int’l, *Latvia*, *supra* note 9, at 26; Amnesty Int’l, *Lithuania*, *supra* note 9, at 56.

⁵¹⁹ Maria Cheresheva & Luděk Stavinoha, *Schengen in Sights, EU and Frontex Overlook Violent Bulgarian Pushbacks*, Le Monde (Feb. 27, 2024), https://www.lemonde.fr/en/les-decodeurs/article/2024/02/27/how-the-eu-is-overlooking-bulgaria-s-unlawful-migrant-pushbacks-ahead-of-its-schengen-entry_6562795_8.html.

⁵²⁰ *Valstybės sienos apsaugos tarnyba*, Case C-72/22 PPU, EU:C:2022:505.

⁵²¹ BNS, *FRONTEX “Sees No Need” to Terminate Operation in Lithuania, Says Border Guard Chief*, LRT (2021), <https://www.lrt.lt/en/news-in-english/19/1519715/frontex-sees-no-need-to-terminate-operation-in-lithuania-says-border-guard-chief>.

authorities.⁵²² It is clear that FRONTEX's involvement in this was *ab initio* contrary to EU law and may have facilitated the commission of mass human rights violations.

An intricate interplay between the EU, including its different Institutions and Agencies,⁵²³ the Member States, and third countries, often acting on the basis of the EU's or its Member States' intelligence and instructions, forms a complicated web of impunities, making the question of "who is responsible" frequently difficult to answer. While the Member States retain primary responsibility for the management of their sections of the external borders,⁵²⁴ "it is often the responsibility of the host state that triggers that of the agency, that can incur responsibility not only as a result of its officers in Warsaw, but also for the conduct of its deployed teams on the ground."⁵²⁵

In fact, the Agency is failing even in achieving the main purposes for which it has been established: in 2021, the European Court of Auditors found that "FRONTEX's support for Member States/Schengen associated countries in fighting against illegal immigration and cross-border crime is not sufficiently effective."⁵²⁶ The figures reported by the EU tell us that irregular crossings of the EU's borders (along the Central and Western Mediterranean Route) increased each year,⁵²⁷ attesting to the Agency's failure and feeding the appetite for anti-migrant politics.⁵²⁸ Restrictive migration policies do not decrease migration.⁵²⁹

A. The agency No. 1 of EU lawlessness law

The FRONTEX story has been told numerous times.⁵³⁰ Created in 2004 to facilitate and render more effective the application of EU measures related to the management of external borders, it has seen its mandate, funding, and staff extended

⁵²² Nikolaj Nielsen, *Frontex Ends Lithuania Border Surveillance Operation*, EU Observer (2022) <https://euobserver.com/migration/155523>.

⁵²³ Other agencies such as the European Union Agency on Asylum (EUAA) are not immune from contributing to the edifice of EU lawlessness law either. There are some strong clues that the functioning of the EUAA has also been marked by EU lawlessness law, especially in its involvement in the asylum processing on the Greek islands. See Moreno-Lax et al., *supra* note 376, at 59–60; Bousiou, *supra* note 311; Agostina Pirrello, *European Union Agency for Asylum* EUR. L.J. 1 (2024, early view).

⁵²⁴ Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, 2019 O.J. (L 295) 1, art 7.

⁵²⁵ Mariana Gkliati, *The Next Phase of The European Border and Coast Guard: Responsibility for Returns and Pushbacks in Hungary and Greece*, 7(1) EUR. PAPERS, 172, 186 (2022).

⁵²⁶ European Court of Auditors, *FRONTEX's support to external border management*, 1, 46 (2021), https://www.eca.europa.eu/Lists/ECADocuments/SR21_08/SR_Frontex_EN.pdf.

⁵²⁷ EUTF for Africa, *2023 annual report*, Publications Office of the European Union, 1, 11 (2024).

⁵²⁸ Thomas Gammeltoft-Hansen, *The rise of the private border guard*, in *THE MIGRATION INDUSTRY AND THE COMMERCIALIZATION OF INTERNATIONAL MIGRATION* (Thomas Gammeltoft-Hansen & Ninna Nyberg Sørensen eds., 1st ed. 2012).

⁵²⁹ Hein de Haas et al., *International Migration Trends, Determinants and Policy Effects*, 1, 5 (IMI Working Paper Series no. 142, Jan. 2018); Ruben Andersson, *Europe's Failed 'Fight' against Irregular Migration*, 42(7) J. ETHNIC & MIGR. STUD. 1055, 1058 (2016).

⁵³⁰ See, e.g., the literature in *supra* note 20. See also Giulia Raimondo, *The European Integrated Border Management: Frontex, Human Rights, and International Responsibility* (Hart Publishing, 2024).

enormously over the years that followed through four major amendments to the FRONTEX founding Regulation.⁵³¹

Today the Agency is entrusted with ensuring European integrated border management at the external borders with a view to manage those borders efficiently and addressing migratory challenges and threats at the external borders.⁵³² Its tasks include supporting Member States in the management of external borders and participating in joint operations at the borders with them,⁵³³ cooperating with third countries by providing them with technical and operational assistance within the framework of the external action policy of the Union.⁵³⁴ It can also develop joint operations with third countries and deploy staff outside the EU, even beyond countries neighboring the EU,⁵³⁵ to provide support for border management. It also assists EU Member States at all stages of the return process,⁵³⁶ monitors migration flows and carries out risk analysis at the external borders for irregular migration and cross-border criminal activity,⁵³⁷ trains border guards across Europe and outside European borders, and evaluates the capacity⁵³⁸ and readiness of Member States to meet the challenges at external borders—the so-called vulnerability assessments.⁵³⁹

FRONTEX is endowed with important tools to perform its tasks. The 2019 Regulation provides that the Agency shall include the European Border and Coast Guard, to number up to 10,000 operational staff by 2027.⁵⁴⁰ Its budget has grown steadily since its creation, starting at EUR 6 million,⁵⁴¹ reaching EUR 754 million in 2022 and is projected to reach an average of EUR 900 million per year for the 2021–2027 period.⁵⁴²

⁵³¹ Art. 1(1) & (2), Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 2004 O.J. (L 349) 1 modified by Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 2011 O.J. (L 304) 1 and then repealed by Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, 2016 O.J. (L 251), 1. Regulation (EU) 2016/1624 was itself repealed by Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, 2019 O.J. (L 295) 1 (hereinafter: EBCG Regulation).

⁵³² EBCG Regulation, arts 1 & 2.

⁵³³ EBCG Regulation, arts 7(1), (3), (4) & 10(1)(d), (h) & (i); *also*, arts 36 *et seq.* (section 7).

⁵³⁴ EBCG Regulation, arts 10(1)(k), 71 & 73.

⁵³⁵ EBCG Regulation, art. 37.

⁵³⁶ EBCG Regulation, arts 7(2), (3), (4) & 10(1)(1), (n), (o), (p); *See also* art. 48 *et seq.* (section 8).

⁵³⁷ EBCG Regulation, arts 10(1)(a) & 29.

⁵³⁸ EBCG Regulation, art. 10(1)(w).

⁵³⁹ EBCG Regulation, art. 10(1)(c).

⁵⁴⁰ *See* EBCG Regulation, art 5(2) & Annex I. *See also* Art. 54 *et seq.* (Section 9).

⁵⁴¹ For FRONTEX Budget throughout the years, *see*: Statista, *Annual budget of FRONTEX in the European Union from 2005 to 2021* (2021), <https://www.statista.com/statistics/973052/annual-budget-FRONTEX-eu/>.

⁵⁴² European Court of Auditors, *supra* note 526. In 2023, this budget amounted to EUR 822,957,124 million and 922,074,136 for 2024. For the future, the envisaged total is 1,127,174,570 for 2025, 1,215,206,071 for 2026, and 1,265,653,160 for 2027. *See*: Frontex, *Frontex contributions as requested*

With the 2016 and 2019 reforms of FRONTEX, its responsibility shifted from complicity to direct responsibility.⁵⁴³ Its intelligence tasks have also grown tremendously, to the point where it has become “an intelligence actor.”⁵⁴⁴ The Agency benefits from an extensive near-time exchange⁵⁴⁵ of information with Member States regarding border-related data through the European border surveillance system (EUROSUR), a mass surveillance and data exchange program which it coordinates and helped establish.⁵⁴⁶ Saving lives is only a secondary goal of EUROSUR, which is in fact “first and foremost an instrument for the gradual establishment of an integrated system for the management of the external borders,”⁵⁴⁷ with issues also likely to arise in terms of data protection.⁵⁴⁸ On top of this, FRONTEX is also in charge of collecting information in third countries for operational and strategic use, as well as identifying third-country nationals in third countries to fight against irregular immigration, through the EU Network of Immigration Liaison Officers.⁵⁴⁹ The cherry on the pie is that FRONTEX is responsible for the establishment and operation of the European travel information and authorization system (ETIAS) Central Unit,⁵⁵⁰ which brings with it a new form of arbitrariness: power and discretion are delegated to an algorithm without sufficient specification and limitations by the legislator.⁵⁵¹

Florin Coman-Kund is right that in just a few years, “FRONTEX made a ‘quantum leap’ from a rather traditional EU agency equipped with lighter supporting and coordination tasks, to a much stronger EU administrative body entrusted with quite significant and controversial operational capacities and enforcement powers, including on the territories of third countries.”⁵⁵² Neither its accountability safeguards nor an adequate level of human rights protection and Rule of Law compliance have been developed in proportion to the expansion of its mandate and tools.⁵⁵³

following the hearing before the I Committee on Constitutional, Presidency of the Council of Ministers and Interior Affairs of the Italian Chamber of Deputies on 13th March 2024, <https://shorturl.at/ELTnu>.

⁵⁴³ Gkliati, *supra* note 525.

⁵⁴⁴ Rijpma & Vermeulen, *supra* note 20.

⁵⁴⁵ Silvan Pollozek, *Turbulences of Speeding up Data Circulation. FRONTEX and Its Crooked Temporalities of ‘Real-Time’ Border Control*, 15(5) MOBILITIES 677 (2020).

⁵⁴⁶ EBCG Regulation, arts 18–19(1) & 10(1)(f); Rijpma & Vermeulen, *supra* note 20.

⁵⁴⁷ Rijpma & Vermeulen, *supra* note 20.

⁵⁴⁸ Sarah Tas, *FRONTEX and Data Protection: Another Rule of Law Challenge in Sight?*, VERFBLOG (Sept. 9, 2022), <https://verfassungsblog.de/FRONTEX-and-data-protection/>; Deibler, *supra* note 153.

⁵⁴⁹ Regulation (EU) 2019/1240 of the European Parliament and of the Council of 20 June 2019 on the creation of a European network of immigration liaison officers (recast) PE/50/2019/REV/1, 2019 O.J. (L 198) 88. *See also* EBCG Regulation, arts 10(1)(d) & 77; They also operate within EU Member States, where they have a monitoring-like function: Evangelia Tsourdi, *Beyond the “Migration Crisis”*, in *THE ROLE OF EU AGENCIES IN THE EUROZONE AND MIGRATION CRISIS* 184 *et seq.* (Johannes Pollak & Peter Slominski eds., 1st ed. 2021).

⁵⁵⁰ EBCG Regulation, art. 67.

⁵⁵¹ Amanda Musco Eklund, *FRONTEX and ‘Algorithmic Discretion’ (Part I): The ETIAS Screening Rules and the Principle of Legality*, VERFBLOG (2022/9/10), <https://verfassungsblog.de/FRONTEX-and-algorithmic-discretion-part-i/>; Amanda Musco Eklund, *Limits to discretion and automated risk assessments in EU border control: Recognising the political in the technical*, 30 EUR. L.J. 103 (2024).

⁵⁵² Florin Coman-Kund, *Hybrid EU External Border Management*, VERFBLOG (2022/9/06), <https://verfassungsblog.de/hybrid-eu-external-border-management/>.

⁵⁵³ Luisa Marin, *Frontex at the Epicentre of a Rule of Law Crisis at the External Borders of the EU*, 30 EUR. L.J. 11 (2024).

B. Total absence of transparency and accountability

Without transparency, it is difficult and sometimes impossible to provide accountability safeguards.⁵⁵⁴ This is the case for FRONTEX. Beyond being one of the tasks of the Agency,⁵⁵⁵ transparency is an EU fundamental right⁵⁵⁶ and FRONTEX, as an EU Agency, is subject to it, including Regulation 1049/2001 on access to documents, and offering reliable and easily accessible information on relevant activities.⁵⁵⁷ All the legislative framework notwithstanding, the lack of transparency constitutes a structural problem for FRONTEX. Systematic abuses were revealed solely through whistleblowers, leaked reports, and individual testimonies.⁵⁵⁸ Even the OLAF report, made available to MEPs months after it was written, has still not been officially disclosed, which does not appear to be justified in light of the ECJ's case-law, as explained by Laura Salzano.⁵⁵⁹ The broad acceptance of the emergency, "crisis," and securitization narratives, which has become a mainstay befogging the law,⁵⁶⁰ is a key tool in justifying the absence of transparency and thus accountability.⁵⁶¹ This has important consequences for FRONTEX's accountability, especially when it comes to its role in joint operations, where accountability is already very hard to establish.⁵⁶²

Lack of transparency is a problem at the heart of FRONTEX design.⁵⁶³ From an internal perspective, the FRONTEX Management Board has not been able to ensure that the Agency does not abuse its powers, as documented in the OLAF report.⁵⁶⁴ This is not surprising: the Management Board is composed solely of the Commission and the Member States, represented by the heads of the border authorities, without any other representation to ensure respect for human rights and the other values and principles of the Union.⁵⁶⁵ No democratic institutions are represented, and even though the role of the European Parliament in the discharge of FRONTEX budget is

⁵⁵⁴ See Mark Bovens et al., *Public Accountability*, in THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY 1, 9 (Mark Bovens et al. eds., 1st ed. 2014); Lilian Tsourdi et al., *The EU's Shifting Borders Reconsidered*, 7 EUR. PAPERS 87, 95 (2021).

⁵⁵⁵ Regulation 2019/1986, art. 10(1).

⁵⁵⁶ CFR art. 42.

⁵⁵⁷ See Parliament and Council Regulation 1049/2001, Regarding Public Access to European Parliament, Council and Commission Documents, 2001 O.J. (L 145) 43.

⁵⁵⁸ See Mariana Gkliati, *What's in a Name?: Fragments of Accountability and the Resignation of the FRONTEX Executive Director*, VERFBLOG (Sept. 6, 2022) ¶9, <https://verfassungsblog.de/whats-in-a-name/>.

⁵⁵⁹ See Laura Salzano, *The Secretiveness over the OLAF Report on FRONTEX Investigation*, VERFBLOG (Sept. 9, 2022) at ¶15, <https://verfassungsblog.de/the-secretiveness-over-the-olaf-report-on-fronalex-investigations/>.

⁵⁶⁰ Violeta Moreno-Lax, *Crisis as (Asylum) Governance*, 9 EUR. PAPERS 179 (2024).

⁵⁶¹ See Gkliati & Kilpatrick, *supra* note 145, at 61; Daria Davitti, *Biopolitical Borders and the State of Exception in the European Migration 'Crisis'*, 29 EUR. J. INT'L L. 1176, 1185 (2019).

⁵⁶² European Ombudsman, Decision in OI/4/2021/MHZ on how the European Border and Coast Guard Agency (Frontex) complies with its fundamental rights obligations and ensures accountability in relation to its enhanced responsibilities (Mar. 4, 2021), para 15, <https://www.ombudsman.europa.eu/en/decision/en/151369>. See Part VI(c), *infra*.

⁵⁶³ See Marin, *supra* note 553.

⁵⁶⁴ See OLAF, *supra* note 11.

⁵⁶⁵ See Marin, *supra* note 553.

potentially significant,⁵⁶⁶ suspending funding⁵⁶⁷ appears to have no direct impact on FRONTEX activities and mandate.⁵⁶⁸ In opposition to the financial performance, there is no external control or supervision of FRONTEX activities in terms of human rights performance.⁵⁶⁹ Even the function of the Fundamental Rights Officer (FRO), introduced in 2011 and mandated with the monitoring of the implementation of the Agency's fundamental rights obligations, is internal to FRONTEX and dependent on the Executive Director,⁵⁷⁰ who has been shown not to take the FRO's recommendations seriously.⁵⁷¹ Of course, in addition to the European Parliament, some accountability "sticking plasters" could always be explored, such as the European Ombudsman and the Fundamental Rights Agency. However, as Sarah Tas explains, in the context of the hotspots where FRONTEX plays a key role—including in the violation of fundamental rights—these mechanisms are simply insufficient to monitor the complex environment there.⁵⁷²

C. The "problem of many hands" as a vehicle of lawlessness at EU borders

One of the major elements which helps reduce FRONTEX responsibility is the involvement of many state and non-state actors in border management, including the relevant Member State, third states, private parties, other EU agencies, as well as other European organizations.⁵⁷³ This state of affairs has been famously characterized by

⁵⁶⁶ See Tineke Strik, *European Oversight on Frontex*, VERFBLOG, (Sept. 8, 2022) ¶2, <https://verfassungsblog.de/european-oversight-on-FRONTEX/>.

⁵⁶⁷ In 2021, the European Parliament granted the discharge but asked for part of the 2022 budget to be frozen. See Parliament Resolution 11352/2021 — C9-0353/2021 — 2021/0227(BUD), On the Council Position of the Draft General Budget of the European Union for the Financial Year 2022, 2022 O.J. (C 184) 179. In May 2022, the European Parliament withheld FRONTEX discharge until the full OLAF investigation report became available. See European Parliament Press Releases, Discharge: MEPS Delay Signing Off on Accounts of EU Border Control Agency FRONTEX (May 4, 2022) <https://www.europarl.europa.eu/news/en/press-room/20220429IPR28235/discharge-meps-delay-signing-off-on-accounts-of-frontex>.

⁵⁶⁸ See Michele Gigli, *Financial Scrutiny as a Political Accountability Tool*, VERFBLOG (Sept. 8, 2022) ¶3, <https://verfassungsblog.de/financial-scrutiny-of-FRONTEX-as-a-political-accountability-tool/>. See also: Michele Gigli, *The Potential of Budgetary Discharge for Political Accountability*, 30 EUR. L.J. 238 (2024).

⁵⁶⁹ See Marin, *supra* note 553.

⁵⁷⁰ See Gkliati, *supra* note 558, at ¶10. As explained by Gkliati, there is external control for certain financial and administrative matters. Specifically, OLAF investigates illegal reception, allocation of funding, corruption and serious misconduct. See Regulation 2019/1986, art. 117. Besides, the European Court of Auditors exercises control over the budgetary and financial management of the Agency. See, *Id.*, art. 116. Additionally, the European Ombudsman can also receive complaints against the agency regarding denied requests for access to documents or other types of maladministration. See, TFEU art. 228; CFR art. 43.

⁵⁷¹ Strik, *supra* note 566 ¶7. See Committee on Civil Liberties, Justice, and Home Affairs, *Report on the Fact-Finding Investigation on FRONTEX Concerning Alleged Fundamental Rights Violations*, C (2021) 1 final (Jul. 14, 2021); Amnesty Int'l, *Lithuania*, *supra* note 9, at 56.

⁵⁷² Sarah Tas, *Fundamental Rights Violations in the Hotspots*, 7(1) EUR. PAPERS 215 (2022). See also Satoko Horii, *Accountability, Dependence and EU Agencies*, 37 REFUGEE SURVEY QUARTERLY 204 (2018).

⁵⁷³ A paradigmatic example is the *International Centre for Migration Policy Development* (hereafter: ICMPD) created in 1993. Its funding mainly comes from member states, the European Commission and the UN. The ICMPD has been the subject of severe criticism from NGOs and journalists due to its involvement in border management and return projects in, *inter alia*, Libya, Tunisia and Turkey: e.g., Statewatch, *Decrypting ICMPD* (Jun. 14, 2021), <https://www.statewatch.org/observatories/immigration-and-asylum-in-europe/2021/decrypting-icmpd/>; Sofian Philip Naceur, *Decrypting ICMPD. How a Vienna-Based Organization Coordinates and Facilitates for the Expansion of a Restrictive Multi-Stakeholder Border*

André Nollkaemper as “the problem of many hands:”⁵⁷⁴ accountability and responsibility are in a grey zone when it comes to concerted and complex actions, and it becomes very difficult for individuals and professional lawyers to practically and legally identify the accountable actors. It becomes even more difficult with the introduction of remote management techniques and proxy third actors.⁵⁷⁵ Several elements contribute to intensifying the many hands problem in such cases.

The first is the hybrid nature of EU agencies—in between EU institutions and Member States—which has been widely commented on and researched.⁵⁷⁶ FRONTEX is one such EU agency and serves both the EU, especially the Commission, and the Member States.⁵⁷⁷ Such hybrid nature is also reflected in its mandate as the Agency in charge of a “multi-actor” European Border and Coast Guard, which is composed of FRONTEX and national competent authorities.⁵⁷⁸ The joint operations between FRONTEX and the Member States—part of which is called “Joint implementation patterns”⁵⁷⁹—are equally telling as regards the superposition and complexity of multi-actor actions.⁵⁸⁰ Joint operations are achieved when one or more Member State is supported in the management of border areas under pressure through joint border control or joint return operations and involves the deployment of additional border guards, experts and equipment, which makes the identification of the responsible actor between the Member States and FRONTEX even more obscure.⁵⁸¹ FRONTEX takes a leading role in these operations.⁵⁸²

The multiplicity of actors in EU border management is reinforced by the fact that operations increasingly involve, directly or indirectly, private actors,⁵⁸³ such as private military and security companies⁵⁸⁴ or carriers,⁵⁸⁵ to perform numerous activities related to border controls, including those, which entail a high risk of gross human

Control Regime in Tunisia and beyond, Forum Tunisien pour les droits économiques et sociaux – FTDES, 42 *et seq.* (July 2021), <https://ftdes.net/rapports/DecryptingICMPD.pdf>; Benjamin Bathke, *Investigation reveals how little-known organization supports controversial Libyan and Tunisia coast guards* (May 22, 2023) <https://www.infomigrants.net/en/post/49086/investigation-reveals-how-littleknown-organization-supports-controversial-libyan-and-tunisia-coast-guards>. Oversight is missing: Raach et al., *supra* note 472, at 51.

⁵⁷⁴ See André Nollkaemper, *The Problem of Many Hands in International Law*, Amsterdam Center for International Law 2015-15 (2015) ¶5; Gkliati & Kilpatrick, *supra* note 145, at 64. This expression was coined by Dennis F. Thompson. See Dennis F. Thompson, *Moral Responsibility of Public Officials: The Problem of Many Hands*, 74 AM. POL. SCI. REV. 905 (1980).

⁵⁷⁵ The mechanisms of ‘contactless control’ exercised via remote management techniques and/or through a proxy third actor can trigger human rights obligations: Moreno-Lax, *supra* note 144. See also Violeta Moreno-Lax, *Meta-Borders and the Rule of Law*, 71 NETHERLANDS INT’L L. REV. 21 (2024).

⁵⁷⁶ See Merijn Chamon, *EU Agencies* (2016); Florin Coman-Kund, *European Union Agencies as Global Actors* (2018).

⁵⁷⁷ See Coman-Kund, *supra* note 576.

⁵⁷⁸ *Id.*

⁵⁷⁹ See Tsourdi, *supra* note 549, at 4.

⁵⁸⁰ Fink and Mungianu provide overviews of such joint operations: Fink, *supra* note 145; Mungianu, *supra* note 145, at 37.

⁵⁸¹ Fink, *supra* note 145, at 4; Mungianu, *supra* note 145, at 3.

⁵⁸² Mungianu, *supra* note 145, at 47.

⁵⁸³ See Gammeltoft-Hansen, *supra* note 528 at 128.

⁵⁸⁴ *Id.*, at 152; Daria Davitti, *Beyond the Governance Gap*, 21 GERMAN L. J. 487, 487 (2020).

⁵⁸⁵ See Tendayi Bloom, *The Business of Migration Control*, 6 GLOB. POL’Y 151 (2015).

rights abuses.⁵⁸⁶ The question of “hidden coercion” through carrier sanctions let alone,⁵⁸⁷ the privatization of such activities implies a vast increase in often opaque expenditure.⁵⁸⁸ Most of the contracts concluded with private companies (e.g. Airbus and Elbit) related to aerial surveillance (to track vessels in distress and forward the relevant information to the so-called “Libyan Coast Guard” which hunts and imprisons people for profit under the pretext of saving them).⁵⁸⁹ These amounted to over EUR 100 million between 2014 and 2020, as reported by Statewatch.⁵⁹⁰ The use of new technology has made it increasingly difficult to engage the responsibility of state and non-states actors in pushing and pulling back the racialized passport poor. The example of drones and satellites as new tools of surveillance—allowing “touchless” and remote management—is paradigmatic: pushbacks and pullbacks to Libya have been carried out mainly through the transmission of data to EU’s Libya-based proxies, delegating the final stages of committing each crime. Translated into Eurospeak, the new technologies allow the identification of suspect boats in the Mediterranean and signaling third country partners.⁵⁹¹

Events at the Belarusian border are equally paradigmatic: FRONTEX has deployed “return specialists” into Latvia who, according to the Agency, are “in principle employees of the national authorities of the Member States.”⁵⁹² Moreover, FRONTEX’s border guards and officers from the Member States were deployed together at the Belarusian border as part of the European Border and Coast Guard Standing Corps.⁵⁹³ FRONTEX also helped Poland to return Iraqi nationals who entered the country via Belarus—at least 213 Iraqi nationals on 66 flights between July 2011 and May 2022,⁵⁹⁴ but likely more.⁵⁹⁵ It appears that FRONTEX acted merely

⁵⁸⁶ See Statewatch, *Funds for Fortress Europe* (Jan. 28, 2022), <https://www.statewatch.org/analyses/2022/funds-for-fortress-europe-spending-by-FRONTEX-and-eu-lisa/> at ¶15.

⁵⁸⁷ See Tendayi Bloom & Verena Risse, *Examining Hidden Coercion at State Borders*, 7 ETHICS & GLOB. POL. 65 (2014); Tilman Rodenhäuser, *Another Brick in the Wall*, 26 INT’L J. REFUGEE L. 223, 224–225 (2014).

⁵⁸⁸ See Statewatch, *supra* note 153. On the privatization of the asylum systems, see Tally Kritzman-Amir, *Privatization and Delegation of State Authority in Asylum Systems*, 5 L. & ETHICS OF HUM. RTS 191 (2011).

⁵⁸⁹ See Sea-Watch, *Crimes of the European Border and Coast Guard Agency FRONTEX in the Central Mediterranean Sea* (2021) https://sea-watch.org/wp-content/uploads/2021/05/FRONTEX-Factsheet_Airborne_Sea-Watch_May-2021.pdf.

⁵⁹⁰ Statewatch, *FRONTEX: Big Spending on Aerial Surveillance* (2022) <https://www.statewatch.org/news/2022/june/FRONTEX-big-spending-on-aerial-surveillance/> at ¶ 4.

⁵⁹¹ See European External Action Service EEAS (2018) 835, *Strategic Review on EUNAVFOR MED Operation Sophia, EUBAM Libya & EU Liaison and Planning Cell*, 2018 at ¶¶80-83.

⁵⁹² Amnesty Int’l, *Latvia*, *supra* note 9.

⁵⁹³ European Parliament, LIBE Committee on Civil Liberties, Justice and Home Affairs (2022) *Mission Report following the LIBE mission Vilnius, Lithuania, and Riga, Latvia, 1 to 3 March 2022*, published on 14 July 2022.

⁵⁹⁴ See the letter that Uku Sarekanno addressed to Mr Shotton on behalf of FRONTEX Director General for Migration and Home Affairs, available at: https://www.europarl.europa.eu/doceo/document/E-9-2022-001410-ASW-ANN02_EN.pdf. This letter follows the Parliamentary questions by Erik Marquardt of 8 April 2022 on FRONTEX involvement in forced returns – Poland and Belarus. Available at: https://www.europarl.europa.eu/doceo/document/E-9-2022-001410_EN.html

⁵⁹⁵ Yeni Safak, *FRONTEX Offers to Help Poland Return Iraqi Refugees Who Entered via Belarus. 1,700 Iraqis Can Potentially Be Sent Back to Their Country, Says Agency’s Director* (2021) <https://www.yenisafak.com/en/news/frontex-offers-to-help-poland-return-iraqi-refugees-who-entered-via-belarus-3584005>.

as a rubberstamp of national decisions, while helping dilute responsibility for the crimes committed, and this is increasingly clear when it comes to assisted returns operated by FRONTEX.⁵⁹⁶

Even where FRONTEX does not itself perpetrate the human rights violations, the Executive Director is supposed immediately to suspend all operational activities in a Member State “if he or she considers that there are violations of fundamental rights or international protection obligations related to the activity concerned that are of a serious nature or are likely to persist.”⁵⁹⁷ Such violations of human rights have been proven in Greece, Bulgaria, Latvia and Lithuania, among others. In light of the above, the widely-reported suspension of FRONTEX activities in Hungary,⁵⁹⁸ out of all the places where proven crimes occur, could point to a political abuse of such suspension: the Hungarian border, lawless as all the other EU borders are, through which the racialized passport poor could enter, is not known for its death-tolls, unlike those created by the total lawlessness reigning in Greece, for instance, where FRONTEX continues to operate.

On top of the complex maze of accountabilities involving the Member States, FRONTEX and private partners, FRONTEX’s operational role abroad has been on the rise, as the cooperation between the Agency and third countries⁵⁹⁹ and assistance to third countries⁶⁰⁰ is growing. This cooperation includes return and readmission,⁶⁰¹ the fight against human trafficking, the provision of training and technical assistance to the authorities of third countries for the purposes of border management. It was mainly developed through the use of “working arrangements,” “liaison officers” and “joint operations.” As of today, the FRONTEX website indicates twenty-one working agreements with third countries and partners,⁶⁰² although this list is likely to be longer as it does not specify the recently concluded agreement with the CSDP mission

⁵⁹⁶ Tineke Strik, *Frontex’s Expanding Mandate: Has Democratic Control Caught up?* 30 EUR. L.J. 217 (2024).

⁵⁹⁷ EBCG Regulation, art. 46(6).

⁵⁹⁸ Euractiv, *EU Border Agency Suspends Operations in Hungary* (Jan. 28, 2021) <https://www.euractiv.com/section/justice-home-affairs/news/eu-border-agency-suspends-operations-in-hungary/>.

⁵⁹⁹ See EBCG Regulation, art. 73.

⁶⁰⁰ See EBCG Regulation, art. 74.

⁶⁰¹ Frasca, *supra* note 213, at 17.

⁶⁰² See EBCG Regulation, art. 73(4). The list of working arrangements is available on FRONTEX webpage: <https://prd.FRONTEX.europa.eu/>.

EUCAP Sahel Niger,⁶⁰³ neither the previous agreements.⁶⁰⁴ These soft working agreements suffer from the same significant drawbacks as other soft law instruments and are likely to carry significant implications for the respect of human rights, including offering no effective judicial remedy.⁶⁰⁵

FRONTEX may also deploy liaison officers in third countries,⁶⁰⁶ prioritizing countries of origin or transit of illegal immigration.⁶⁰⁷ Such officers are tasked with assisting such countries in the prevention of and fight against illegal immigration and facilitating returns. Among others, they provide technical assistance in the identification of third-country nationals and the acquisition of travel documents.⁶⁰⁸ Such liaison officers have been deployed in countries with which FRONTEX has working arrangements, among others.⁶⁰⁹

Moreover, since 2016, FRONTEX has been able to assist third countries on the ground with EU personnel operating under third-state command, and following the conclusion of a Status Agreement between the EU and the third country, as well as an Operational Plan,⁶¹⁰ with important legal and practical implications.⁶¹¹ Juan Santos Vara explains that these joint operations “have become increasingly complex involving the Agency itself, officers from the Member State, third states, private parties and other EU agencies like EUAA or Europol,”⁶¹² giving rise to significant

⁶⁰³ *Working Arrangement between Frontex and the European Union Capacity Building Mission in Niger* (EUCAP Sahel Niger) (15 Jul. 15, 2022) <https://shorturl.at/diREd>. The Agency plans a similar partnership with EUBAM Libya: Statewatch, *Frontex to boost border control efforts in Niger, Algeria and Libya* (Mar. 10, 2022), <https://www.statewatch.org/news/2022/march/frontex-to-boost-border-control-efforts-in-niger-algeria-and-libya/>; Statewatch, *EU: Tracking the Pact: Commission “to step up border management support at Libya’s Southern border”* (Sept. 21, 2023), <https://www.statewatch.org/news/2021/september/eu-tracking-the-pact-commission-to-step-up-border-management-support-at-libya-s-southern-border/>. See also, *Report from the Commission to the European Parliament and the Council on the evaluation of Regulation (EU) 2019/1896 on the European Border and Coast Guard, including a review of the Standing Corps* SWD (2024) 75 final (Feb. 2, 2024), https://www.astrid-online.it/static/upload/fron/frontex-report_swd.pdf.

⁶⁰⁴ E.g., Frontex, *Frontex to expand cooperation with Operation IRINI* (Jan. 18, 2021), <https://www.frontex.europa.eu/media-centre/news/news-release/frontex-to-expand-cooperation-with-operation-irini-1YCjyo>.

⁶⁰⁵ Frasca, *supra* note 213.

⁶⁰⁶ Article 77(3) EBCG Regulation. This possibility was initially geographically limited to countries neighboring the EU. The 2019 revision of the EBCG Regulation extended it to all third states; see also Fink & Idriz, *infra* note 611.

⁶⁰⁷ The Agency may receive liaison officers posted by those third countries on a reciprocal basis (Article 77(2) EBCG Regulation).

⁶⁰⁸ Article 77(3) EBCG Regulation.

⁶⁰⁹ E.g., Turkey Albania, Senegal (covering The Gambia and Mauritania) and Moldova (covering Moldova, Ukraine, Georgia, Armenia, and Azerbaijan): <https://www.frontex.europa.eu/what-we-do/beyond-eu-borders/liaison-officers/>.

⁶¹⁰ EBCG Regulation, art. 73(3). Such status agreements were concluded with Moldova, Serbia, Montenegro, Albania, and North Macedonia. European Commission, *Frontex status agreements with non-EU countries*, <https://eur-lex.europa.eu/EN/legal-content/summary/frontex-status-agreements-with-non-eu-countries.html>. The EU plans to conclude more Status Agreements for the launch of joint operation with Morocco, Senegal and Mauritania and negotiations are open with Senegal and Mauritania: Juan Santos Vara, *The Activities of Frontex on the Territory of Third Countries*, 8(2) EUR. PAPERS, 985, 1000 (2023).

⁶¹¹ Melanie Fink & Narin Idriz, *Effective Judicial Protection in the External Dimension of the EU’s Migration and Asylum Policies?*, in *THE INFORMALISATION OF THE EU’S EXTERNAL ACTION IN THE FIELD OF MIGRATION AND ASYLUM* 117, 135 (EVA KASSOTI & NARIN IDRIZ eds., 2022).

⁶¹² Santos Vara, *supra* note 610, at 1001.

concerns about the respect of human rights and basic accountability in the absence of transparency.⁶¹³

The multiplicity of actors involved in these complex collective activities—also implying many layers of legal authority⁶¹⁴—between FRONTEX, the Member States, third countries, other EU agencies and with the implication of private actors, makes it at times supremely difficult to delve beyond the “many hands” to attribute unlawful conduct, and also raises the legal problem of individual and collective responsibility.⁶¹⁵ In this context, the interpenetration of state and non-state actor involvement is such that it becomes “impossible to find one actor that is entirely and independently responsible for the outcome, since the outcome is a collective one.”⁶¹⁶ Befogging basic accountability in a context where saving lives is not a priority and mass violations of human rights are rampant, is an important tool of EU lawlessness law.

D. Scarcity and inadequacy of judicial remedies

FRONTEX appears to exist in a vacuum of accountability to a large degree due to the fact that any judicial remedies for individuals before the ECJ are scarce and inadequate. It should be recalled that the ECJ has exclusive competence over the liability of EU agencies and, as a result, FRONTEX’s crimes cannot be challenged before national courts,⁶¹⁷ greatly limiting the available judicial remedies for applicants, although international courts remain available.⁶¹⁸ Pushbacks, pullbacks and other crimes perpetrated, assisted or covered up by FRONTEX at EU borders and further afield are extremely difficult to challenge also due to their informal character: even when the victims survive and are not held in concentration camp-like conditions in Libya, or stuck between two rows of soldiers in Belarus, they have little resources to challenge their mistreatment in the courts. Moreover—and equally impotently—the jurisdictional limitations and uncertainties about the application of EU law, and especially the CFR, which itself contains an express obligation of *non-refoulement*, make it even more difficult to challenge pushbacks and pullbacks under EU law, when they purportedly occur outside EU territory.⁶¹⁹ This difficulty is not alleviated by the fact that the perpetrators are agents equipped, tasked and funded by the EU, acting on FRONTEX intelligence.

Four main avenues have been explored by lawyers so far in an attempt to counter the accountability vacuum in which FRONTEX makes its contribution to EU

⁶¹³ Statewatch, *Frontex: Deportations at Record High in First Half of 2023* (Oct. 5, 2023), <https://www.statewatch.org/news/2023/october/frontex-deportations-at-record-high-in-first-half-of-2023/>.

⁶¹⁴ *See, Id.*, at 136.

⁶¹⁵ JOYCE DE CONINCK, THE EU’S HUMAN RIGHTS RESPONSIBILITY GAP (2024); Joyce De Coninck, *Effective Remedies for Human Rights Violations in EU CSDP Military Missions*, 24 GERMAN L.J. 342 (2023).

⁶¹⁶ *See* Gkliati & Kilpatrick, *supra* note 145, at 64.

⁶¹⁷ *See* Gkliati, *supra* note 525, at 184; *Asteris and Others v. Greece and EEC*, Joined Cases C-106/87 & C-120/87, EU:C:1988:457.

⁶¹⁸ *See* Shatz & Branco, *supra* note 12.

⁶¹⁹ *See* De Coninck, *Effective Remedies*, *supra* note 615; Violeta Moreno-Lax & Cathryn Costello, *The Extraterritorial Application of the Charter*, in COMMENTARY ON THE EU CHARTER OF FUNDAMENTAL RIGHTS 1657 (STEVE PEERS ET AL. eds., 2014).

lawlessness law. These include action for failure to act,⁶²⁰ action for annulment,⁶²¹ the transparency procedure,⁶²² and action for damages.⁶²³ The great majority of them have been unsuccessful, generating strong scholarly criticism and demonstrating the absence of accountability via judicial means.⁶²⁴

So, the General Court found inadmissible an action for failure to act,⁶²⁵ where the applicants denounced FRONTEX wrongdoing during Joint Operation Poseidon in the Aegean Sea, which included physical violence, detention and pushbacks. In this case, the applicants, Front-Lex and the Legal Centre Lesvos, invited FRONTEX, in accordance with Article 265 TFEU, to suspend or terminate its activities in the Aegean Sea region.⁶²⁶ FRONTEX rejected the request, arguing that the conditions to adopt such a decision were not met, considering that none of the incidents mentioned by the applicants were capable of demonstrating the existence of infringements of fundamental rights.⁶²⁷ The General Court found the action inadmissible, “irrespective of whether the applicants’ plea is well founded.”⁶²⁸ The General Court further specified that the “complaint that FRONTEX’s position lacks clarity, is not sufficiently detailed and does not provide duly substantiated reasons, could, where appropriate, have formed the basis of an action for annulment under Article 263 TFEU.”⁶²⁹

This suggestion only created confusion, since the traditional limits for an action of annulment make it particularly cumbersome because, to agree with Salvo Nicolosi: “the execution of border management tasks often manifests itself in the form of *de facto* conduct that does not involve the adoption of legally binding acts.”⁶³⁰ Even when legally binding acts are at stake, such as the Status Agreements and Operational Plan in the context of joint operations, applicants can encounter significant challenges to proving their standing.⁶³¹

Moreover, all the actions for transparency and annulment of decisions not to offer access to documents related to FRONTEX’s activities have also been rejected,⁶³² with

⁶²⁰ TFEU, art. 265. *See also* EBCG Regulation, art 98; *SS & ST*, EU:T:2022:235; *ST*, EU:T:2023:776.

⁶²¹ *Luisa Izuzquiza & Arne Semsrott v. European Border and Coast Guard Agency (FRONTEX)* Case T-31/18, EU:T:2019:815.

⁶²² *Leonardo SpA v. European Border and Coast Guard Agency (FRONTEX)*, Case T-675/20, EU:T:2022:870.

⁶²³ TFEU, art. 340(2), which stipulates that an EU institution or agency shall make good any damage caused by its servants in the performance of their duties. *See also* EBCG Regulation, art. 98 and *WS* EU:T:2023:492 (the appeal is currently pending: C-679/23 P); *Hamoudi v. FRONTEX*, Case T-136/22, EU:T:2023:821 (the appeal is currently pending: C-136/24 P).

⁶²⁴ *See* Joyce De Coninck, *Shielding Frontex*, VERFBLOG (Sept. 9, 2023), <https://verfassungsblog.de/shielding-frontex>; Mariana Gkliati, *Shaping the Joint Liability Landscape?*, 9(1) EUR. PAPERS 69 (2024); Gareth Davies, *The General Court finds Frontex not liable for helping with illegal pushbacks*, EUR. L. BLOG (Sept. 11, 2023), <https://shorturl.at/5YjLI>.

⁶²⁵ *SS & ST*, EU:T:2022:235.

⁶²⁶ *Id.*

⁶²⁷ *Id.* ¶¶ 25, 29.

⁶²⁸ *Id.* ¶¶ 32, 33.

⁶²⁹ *Id.* ¶ 33. *See also* *ST*, EU:T:2023:776.

⁶³⁰ Salvo Nicolosi, *FRONTEX and Migrants’ Access to Justice*, VERFBLOG (Sept. 7, 2022), at ¶5, <https://verfassungsblog.de/FRONTEX-and-migrants-access-to-justice/>.

⁶³¹ Fink & Idriz, *supra* note 611, at 139.

⁶³² *Leonardo SpA*, EU:T:2022:870; *Luisa Izuzquiza and Arne Semsrott* EU:T:2019:815.

only one partial exception.⁶³³ The refusal of the Court to support transparency in the context of an EU Agency's well-documented involvement in mass crimes and violations of EU law showcases EU lawlessness law at work. The arguments of the Rule of Law, legality and standing limitations are actively deployed to silence any criticism of EU's activities.⁶³⁴

Finally, actions for damages imply identifying the actor behind the wrongful conduct, which in some cases is an almost impossible task, due to the multiplicity of actors involved and the lack of transparency, as discussed above. Even in those cases where the applicants managed to bring such evidence, the ECJ finds enough legal tools to deny any kind of justice to those affected by the Agency's wrongful actions, such as in two recent actions for damages lodged before the ECJ against the Agency for collective expulsions from Greece conducted in April 2020 in the Aegean Sea.⁶³⁵ All of them were dismissed: no violations have been found and no individual victims who survived FRONTEX's criminal interventions received any compensation.

In *WS*,⁶³⁶ the first such action against FRONTEX, a group of Syrian refugees deported from Greece to Turkey were seeking damages from FRONTEX, which had been involved in the return operations. The Court rejected the action considering that there was no direct link between the damage caused and FRONTEX's conduct, since FRONTEX has no competence in the decision not to grant international protection and the return decision which affected the applicants. The Court, as usual upholding the legality of the EU's lawlessness law, followed "the mantra held always by FRONTEX that it only provides technical operational support to the Member States and Greece had exclusive responsibility."⁶³⁷ Scholars have underlined the absurdity of the Court's reasoning,⁶³⁸ especially regarding the "critical accountability gap in 'many hands' environments."⁶³⁹ The Court reached a similar conclusion dismissing a second action for damages in *Hamoudi* through a different but equally skewed reasoning,⁶⁴⁰ "on the basis of an unattainably high and unrealistic burden, standard and method of proof."⁶⁴¹

The ECJ, tasked in the EU legal system with ensuring that the law is observed, has emerged as an important actor of lawlessness law, supporting the active undoing of the values and principles of EU law for short-term political gains surrounding the passport apartheid and Eurowhiteness. The Court repeatedly sided with human rights abusers in the Mediterranean region: from rejecting all the actions against FRONTEX, to whitewashing the EU-Turkey deal. This is sadly not unusual in the context of the

⁶³³ *Naass and Sea-Watch v FRONTEX*, T-205/22, EU:T:2024:266. FRONTEX has refused to grant full access to 73 documents. The Court ordered that Decision be annulled in so far as it refused access to all pictures and videos related to the aerial operation in the Central Mediterranean Sea on 30 July 2021.

⁶³⁴ Kochenov, *Restoring Dialogical Rule of Law*, *supra* note 172.

⁶³⁵ *See, Hamoudi*, EU:T:2023:821, ¶¶2–5; *WS*, EU:T:2023:492, ¶¶2–16. Cf. Melanie Fink, *The Action for Damages as a Fundamental Rights Remedy*, 21 GERMAN L.J. 532 (2020).

⁶³⁶ *See WS* EU:T:2023:492.

⁶³⁷ Santos Vara, *supra* note 612, at 1007.

⁶³⁸ *See the literature cited supra in note 624.*

⁶³⁹ Gkliati, *supra* note 624, at 85.

⁶⁴⁰ *See Hamoudi*, EU:T:2023:821.

⁶⁴¹ Joyce De Coninck, *Shielding Frontex 2.0: The One with the Impossible Proof*, *VerfBlog*, January 30, 2024.

general human rights⁶⁴² and the Rule of Law⁶⁴³ track-record of the ECJ as of late,⁶⁴⁴ as the Court appears to be most preoccupied with the supremacy of EU law and having the last say,⁶⁴⁵ but it is still astonishing to see a body of the judiciary contributing to EU lawlessness law in such a pro-active way.

This assessment should be nuanced when it comes to the Belarus border: the Court expressly condemned the pushbacks there.⁶⁴⁶ It made clear that EU law precludes any Member State from effectively depriving asylum seekers of the opportunity of access, in the territory of that Member State, the procedure through which applications for international protection are examined, even in the event of a declaration of martial law, or a state of emergency.⁶⁴⁷ This did not lead to any change on the ground from the victims' perspective, especially in the absolute absence of any efforts by the Commission to enforce the judgments and reinstate respect for EU law.

Quite the opposite is true: the EU and its Member States have developed and are constantly perfecting the strategies of detachment and externalization, with less direct involvement and control by Member States and EU agencies, raising further issues in terms of accountability before courts.⁶⁴⁸

CONCLUSION

EU lawlessness law has rearticulated the EU's passport apartheid by implementing the tacit EU's Eurowhiteness objective through the *carte blanche* exclusion of the racialized passport poor virtually entirely from the scope of EU law. As we have demonstrated, this is done by purely legal means, thereby orchestrating and whitewashing mass crimes and ruining hundreds of thousands of lives.⁶⁴⁹ The lesson we learn is the resounding moral and legal failure of the supranational system of law and the national governments hiding in the shadow of what they created, as EU's principles and values have effectively evaporated in the rarified air of a complete lack of democratic and legal accountability for the death of thousands showcasing the urgent imperative to repair the vacant core of EU law.

The EU lawlessness law system is not that wildly imaginative, after all, as it is clearly inspired by the colonial origins of the Balibar *apartheid européen*⁶⁵⁰ rooted in the Schuman Declaration. The EU has always been quintessentially neo-feudal,⁶⁵¹ as its existence *per se* is always personal. This entails an outright deprivation of dignity

⁶⁴² Petra Bárd & Dimitry Kochenov, *What Article 7 Is Not*, in THE ARREST WARRANT AT TWENTY (Adam Łazowski & Valsamis Mitsilegas, eds., 2024); sources in *supra* note 178.

⁶⁴³ Kochenov & Bárd, *supra* note 176; Kochenov & Butler, *supra* note 321.

⁶⁴⁴ Kochenov, *Restoring Dialogical Rule of Law*, *supra* note 172.

⁶⁴⁵ *Id.*

⁶⁴⁶ *Valstybės sienos apsaugos tarnyba*, EU:C:2022:505.

⁶⁴⁷ *Id.*, ¶94.

⁶⁴⁸ See Ermioni Xanthopoulou, *Mapping EU Externalisation Devices through a Critical Eye*, 26 EUR. J. OF MIGR. & L. 108 (2024); Annick Pijnenburg, *From Italian Pushbacks to Libyan Pullbacks*, 20(4) EUR. J. OF MIGR. & L. 396 (2018); Amnesty int'l, *Latvia*, *supra* note 9; Amnesty Int'l, *Lithuania*, *supra* note 9; Baumgärtel, 'Part of the Game': Government Strategies against European Litigation Concerning Migrant Rights, in THE CHANGING PRACTICES OF INTERNATIONAL LAW (Tanja Aalberts & Thomas Gammeltoft-Hansen eds., 2018).

⁶⁴⁹ Shatz & Branco, *supra* note 12.

⁶⁵⁰ Balibar, *supra* note 30.

⁶⁵¹ See the sources in note 57, *supra*.

for all those belonging to the wrong cast of persons in Europe: a foreigner, or a second-rate national,⁶⁵² deserves no protection from its law: a blind spot.⁶⁵³ This has been the story of the EU *vis-à-vis* the individual since the inception of the EU legal order, as it aimed at ensuring that the colonial principles of applying different law, rights and obligations to “European” compared with “non-European” populations of the founding Member States.⁶⁵⁴

This well-tested status quo has recently received a fundamental upgrade: EU lawlessness law, where the passport poor from the global south are placed entirely outside the law in the liminal spaces of EU borders. The result is a growing black hole of accountability *de facto* allowing the Member States to delegate breaches of the ECHR, and national and international law to the EU in full knowledge that they will only find assistance in the shaping of this lawlessness, rather than face any enforcement of the law by the Commission.

Billions of euros are invested into the creation, maintenance and extension, in the words of Urbina, of the EU’s “shadow immigration system,”⁶⁵⁵ which recognizes no human rights protections and is premised on lawlessness and the absence of any accountability, when dealing with the racialized passport poor. The strategy of generously paying for the certainty that non-white migration from the former colonies and the least affluent spaces of the global south more broadly is pushed outside the law has been widely documented by journalists, scholars and NGOs. The widespread torture, enslavement, kidnappings and killings by agents funded directly or indirectly by the EU outside its territory demonstrates that the respect for human rights remains essentially theoretical, as succinctly put by the European Court of Auditors.⁶⁵⁶ While this usually happens by proxy, this is not always the case, as FRONTEX, an EU agency, is at the forefront of stripping racialized non-Europeans of rights and covering up the crimes against them perpetrated by the Member States.

EU lawlessness law showcases the Commission’s unwillingness and incapacity to fulfill its Treaty function. Pavone and Kelemen, Scheppele and Grześkowiak are right: the Treaties are seemingly left without a guardian.⁶⁵⁷ Worse still, the Commission has curated and supported EU lawlessness law through commission and omission leading to significant misappropriation of funds, export of violence and insecurity abroad, helping strike questionable deals with the third countries with tacit illegal objectives and gross procedural violations. The more political the Commission, the more significant its willingness to negotiate away core values of the Union: the current developments lead to the EU’s loss, according to Pech, of the sense of purpose.⁶⁵⁸ Since keeping EU law respected is one of the Commission’s core functions

⁶⁵² *Kaur*, EU:C:2001:106; Kochenov & Dimitrovs, *supra* note 76.

⁶⁵³ Kochenov, *Citizenship without Respect*, *supra* note 95; Kochenov & van den Brink, *supra* note 75.

⁶⁵⁴ Eklund, *supra* note 32; HANSEN & JONSSON, *supra* note 25.

⁶⁵⁵ Urbina, *supra* note 11.

⁶⁵⁶ European Court of Auditors, *supra* note 277, at 3.

⁶⁵⁷ R. Dan Kelemen & Tommaso Pavone, *Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forebearance in the European Union*, 74(4) W. POL. 779 (2023); Kim Lane Scheppele, *EU Treaties without a Guardian*, 29(2) COLUM J. EUR. L. 94 (2023); Grześkowiak, *supra* note 9.

⁶⁵⁸ Laurent Pech, *The Future of the Rule of Law in the EU*, VERFBLOG (Dec. 14, 2023) <https://verfassungsblog.de/the-future-of-the-rule-of-law-in-the-eu/>.

on which the whole edifice stands, its sudden decision to take the side of the abusers, be it Poland, Hungary, Greece, Lithuania, or EU's own Institutions and agencies, such as FRONTEX, leaves the EU increasingly vulnerable.

EU lawlessness law significantly corrupts national democratic systems of the Member States because it offers an ideal shield for politicians who wish to put aside the crucial principles and values on which national constitutional systems rest, including the Rule of Law and human rights protection, and act under the pretext that "it is not us" in order not to apply values, principles, and human rights protections to the "people not like us": the racialized passport poor against whom the lawless Eurowhiteness objectives demand to see "European culture" protected.⁶⁵⁹ The pseudo-causal narrative of "addressing root causes of migration" by investing in "development" is a powerful propaganda shield deployed by the EU institutions and Member States to whitewash misappropriating billions of euros of public money for the maintenance of the lawlessness law system that they have created to solidify the passport apartheid.

The EU lawlessness law, which we have documented, with its multi-billion budget, questionable Eurowhiteness objectives and served by a death-toll running into dozens of thousands, is an urgent wake-up call to start an imperative conversation about the fundamentals of EU constitutionalism. This concerns in particular the role that values, principles and rights, as well as the basic accountability structures—legal and democratic—should play in the context of EU law.

⁶⁵⁹ KUNDNANI, *supra* note 14.

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